No. [redacted] 47

# In the Supreme Court of the United States

OCTOBER TERM, 1943

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, SEATRAIN LINES, INC., ET AL., APPELLANTS

*vs.*

THE PENNSYLVANIA RAILROAD COMPANY, ET AL.

*APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY*

## STATEMENT AS TO JURISDICTION

# In the District Court of the United States for the District of New Jersey

CIVIL ACTION No. 2092

THE PENNSYLVANIA RAILROAD COMPANY, ET AL., PETITIONERS

*v.*

THE UNITED STATES OF AMERICA, DEFENDANT

AND

THE INTERSTATE COMMERCE COMMISSION, SEATRAIN LINES, INC., INTERVENING DEFENDANTS

## JURISDICTIONAL STATEMENT BY DEFENDANTS UNDER RULE 12 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES

The defendant-appellants respectfully present the following statement disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the final judgment or decree in the above-entitled cause sought to be reviewed.

### A. Statutory provisions

The statutory provisions believed to sustain the jurisdiction are:

U. S. C., Title 28, Section 47a (Act of March 3, 1911, c. 231, sec. 210, 36 Stat. 1150; as amended

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by Urgent Deficiencies Act of October 22, 1913; c. 32, 38 Stat. 220).

U. S. C., Title 28, Section 41 (28) (Act of June 18, 1910, c. 309, 36 Stat. 539; as amended March 3, 1911, c. 231, sec. 207, 36 Stat. 1148; October 22, 1913, c. 32, 38 Stat. 219).

U. S. C., Title 28, Section 44 (Act of October 22, 1913, c. 32, 38 Stat. 220; as amended by Act of February 13, 1925, c. 229, sec. 1, 43 Stat. 938).

U. S. C., Title 28, Section 47 (Act of October 22, 1913, c. 32, 38 Stat. 220).

U. S. C., Title 28, Section 345 (Act of March 3, 1891, c. 517, sec. 5, 26 Stat. 827; as amended January 20, 1897, c. 68, 29 Stat. 492; April 12, 1900, c. 191, sec. 35, 31 Stat. 85; April 30, 1900, c. 339, sec. 86, 31 Stat. 158; March 3, 1909, c. 269, sec. 1, 35 Stat. 838; March 3, 1911, c. 231, secs. 238, 244, 36 Stat. 1157; January 28, 1915, c. 22, sec. 2, 38 Stat. 804, February 13, 1925, c. 229, sec. 1, 43 Stat. 938).

**B. The statute of a state, or the statutes or treaty of the United States, the validity of which is involved**

The validity of a statute of a state, or of a statute or treaty of the United States, is not involved, except that the lower court held that there was nothing in a statute of the United States, namely, the Interstate Commerce Act, empowering the Interstate Commerce Commission to direct railroads to furnish freight cars to Seatrain Lines, Inc., a common carrier by water, because Seatrain,

in its operations, takes such cars outside the territorial waters of the United States.

**C. Date of the judgment or decree sought to be reviewed and the date upon which the application for appeal was presented**

The decree sought to be reviewed was entered on December 8, 1943. The petition for appeal was presented and allowed on January 28, 1944, together with the assignment of errors.

**D. Nature of case and of rulings below**

This is an appeal from a final decree of the United States District Court for the District of New Jersey, entered December 8, 1943, setting aside in part an order of the Interstate Commerce Commission dated October 13, 1941, in *Hoboken Manufacturers Railroad Company* v. *Abilene & Southern Ry. Co.*, et al., 248 I. C. C. 109, wherein the Commission prescribed the terms and conditions, including compensation and period of time therefor, upon which defendant railroads which participate in through routes with Seatrain Lines, Inc.,[1] a common carrier by water, should be required to interchange their freight cars with Seatrain.

The question presented is whether the Commission, when it found that "the operation of Sea-

[1] For a description of Seatrain's operations, see *Interstate Commerce Commission* v. *Hoboken Manufacturers' Railroad Co.*, No. 43, October Term, 1943, decided by the Supreme Court on December 6, 1943.

train is in the public interest and is of advantage to the convenience and commerce of the people," could require the railroads to furnish freight cars owned by such railroads to Seatrain, so as to make such operations really effective.

The Hoboken Manufacturers' Railroad is a single-track, terminal-switching line extending along the waterfront of Hoboken, New Jersey, and Seatrain Lines, Inc., is a common carrier by water subject to the Commission's jurisdiction. *Investigation of Seatrain Lines, Inc.*, 195 I. C. C. 215. Since October 6, 1932, Seatrain has operated vessels, on which it transports freight in railroad cars, between Hoboken, New Jersey, and Belle Chasse, Louisiana, via Havana, Cuba.

On November 15, 1932, the American Railway Association promulgated Car Service Rule No. 4,[2] effective on that date, which provided:

> Cars of railroad ownership must not be delivered to a steamship, ferry, or barge line for water transportation, without permission of the owners, filed with the Car Service Division.

Following the promulgation of said Rule 4, the Hoboken Manufacturers' Railroad filed with the Commission a complaint (*Hoboken Manufacturers Railroad Co.* v. *Abilene & Southern Ry. Co.*,

[2] That Car Service Rule No. 4 was aimed at Seatrain's operations is apparent from the fact, as stated (206 I. C. C. 328, 330,) by the Commission, that it was filed "Shortly after inauguration of service by Seatrain * * *."

*et al.*, 237 I. C. C. 97; 248 I. C. C. 109) wherein it was alleged that this rule was unlawful under Section 1 (4) and (11), Section 3 (1) and (3), and Section 7 of the Interstate Commerce Act (49 U. S. C. 1 (4) and (11), 3 (1) and (3), 7). On March 9, 1933, the New Orleans & Lower Coast Railroad filed with the Commission a complaint substantially similar to that of the Hoboken. Both complaints, Docket Nos. 25728 and 25878, were consolidated by the Commission, and hearings thereon were had on one record.

After the usual proceedings, the entire Commission decided the case, on February 5, 1935, finding, *inter alia,* that (206 I. C. C. 328, 332)—

> Seatrain's vessels are designed primarily for the handling of railroad cars in non-break-bulk transportation, and the cooperation of railroads is essential to their successful operation. * * *

The report of the Commission discusses Car Service Rule No. 4 and the practices of the carriers thereunder. It was shown that, as of March 1933, most of the railroads had refused to permit delivery of their cars to Seatrain, although twenty-six railroads consented to the delivery of their cars to Seatrain without restriction and several others had granted such consent with restriction. The Commission stated that "No railroad had refused to permit delivery of their cars to any of the other 11 water lines listed in a circular of

the Association as coming within the intendment of the rule." 206 I. C. C. 328, 337. Moreover, the Commission found that the sole object of Car Service Rule No. 4 was to prevent the diversion of traffic from the all-rail routes to Seatrain. *Ibid.*

The railroad defendants contended that they could not be required to interchange cars with Seatrain unless such cars were required for transportation over through routes to which they were parties or which might be required by the Commission. The Commission agreed with the rail defendants and stated (206 I. C. C. 328, 343):

> We find nothing in the Act imposing any duty upon or giving us jurisdiction to require a rail carrier to permit delivery of its cars to a water carrier where such through routes between such rail and water carriers do not exist.

The Commission also pointed out that the record disclosed that Seatrain participated in through routes and joint rates with Missouri Pacific System and the Texas & Pacific Railway Company, but said "whether defendants who refuse to permit delivery of their cars to Seatrain participate in through routes with Seatrain cannot be determined upon this record. Whether such through routes exist and, if not, whether they should be established are issues in No. 25727, not yet decided." *Ibid.*

The case last referred to, Docket No. 25727, entitled *Seatrain Lines, Inc.*, v. *Akron, C. & Y. Ry.*, 226 I. C. C. 7, was decided on January 28, 1938. The primary relief sought by Seatrain was an order requiring the establishment of through routes with the railroads operating in the East, South, and Southwest where such through routes did not already exist, and the establishment of joint rates in connection with such through routes (226 I. C. C. 7, 9). In its decision, the Commission pointed out that through routes between points in the Southwest and points in trunk-line and New England territories existed for many years in connection with the break-bulk lines operating between north Atlantic ports and New Orleans and Texas Gulf ports (226 I. C. C. 7, 12). On the ground that Seatrain's route between Hoboken, New Jersey, and Bell Chasse, Louisiana, was via Havana, Cuba, the railroad defendants questioned the Commission's jurisdiction to prescribe through routes and joint rates via a foreign country, but the Commission, after full discussion, overruled this contention.

The Commission's findings, insofar as here material, were that through routes in connection with the Seatrain existed between points in trunk-line and New England territories on the one hand and Southwestern territory on the other, and that the public interest required the establishment and maintenance of through routes and joint rates in

connection with Seatrain between certain portions of official territory on the one hand and Southwestern territory and a portion of southern territory on the other.[3]

On November 21, 1938, the Commission reopened Nos. 25728 and 25878, *supra*, "for further hearings to determine upon what terms and conditions (including compensation) defendants should be required to interchange their cars with intervener, Seatrain Lines, Inc."[4] After full hearing, the Commission filed a supplemental report (237 I. C. C. 97) reaffirming its conclusion that it had jurisdiction to require the railroads to interchange their cars with Seatrain whenever through routes exist between Seatrain and defendants. The Commission was of the "view that the period of time during which, and the manner in which, Seatrain should pay for the use of cars, the amount of compensation it should pay, and any other condition which the evidence adduced shows would be an appropriate condition to attach to an order requiring (rail) defendants to interchange their cars with Seatrain" (237 I. C. C. 97, 102) were matters in issue, upon which evidence had

[3] It is admitted in paragraph XV of the amended petition filed in the District Court that the rail defendants, including the Pennsylvania Railroad and some of the petitioners herein, established the through routes so prescribed in Docket No. 25727, and participated therein as directed by said order, and that said through routes were in full force and effect.

[4] Exh. F of amended petition filed in the District Court.

not been received. Accordingly, the proceedings were reopened, and the Commission issued an additional report (248 I. C. C. 109 in Dockets Nos. 25728 and 25878, dated October 13, 1941.

Confining its report[5] of October 13, 1941, to the compensation which the railroad defendants, required to interchange their cars with Seatrain, should receive for the use of such cars, and to what other terms and conditions should be imposed, the Commission concluded (248 I. C. C. 109, 114):

> In all of the circumstances, we find no good reason why Seatrain should pay a higher per diem rate than the $1 now applied uniformly by the car-hire rules, especially when the record shows, and it is admitted, that the cost of maintaining the cars is decreased approximately 10 cents per day while they are in its possession.

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[5] In discussing, in the report, its power to make a finding which would require the defendants to turn over to Seatrain, cars for use in its Cuban traffic, the Commission quoted the following excerpt from *St. Louis, B. & M. Ry. Co.* v. *Brownsville Nav. District*, 304 U. S. 295, 300.

"The (Interstate Commerce) Act extends to transportation only so far as it takes place in this country. Petitioners are not bound by any law, regulation, or tariff to furnish cars for transportation in Mexico. But that freedom from obligation does not imply, that in furnishing equipment for transportation beyond the boundary, petitioners may unreasonably discriminate between shippers, places, or classes of traffic within the United States. * * *"

The ultimate findings of the Commission were (248 I. C. C. 109, 119):

> 1. We find that the defendants in these proceedings listed in the appendix, according as they participate in through routes with complainants and Seatrain, have failed to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operations, in violation of section 1 (4) of the Interstate Commerce Act by refusing to agree to the interchange of freight cars owned by them with complainants for delivery to Seatrain for use in interstate commerce between points in the United States.
>
> 2. We find further that the current code of per diem rules governing the interchange of freight cars between the defendants above referred to and other rail carriers, including the current rate of $1 per day payable by Seatrain for such period as the cars are in its actual possession, would be reasonable for application to the interchange of cars between defendants and complainants for use by Seatrain.

On the same day, the Commission entered the order which is the subject of this suit.

The amended petition was filed in the three-judge District Court on April 15, 1942, and alleges that the Commission's order[*] is void and

[*] Suit was brought against the United States. The Interstate Commerce Commission, the Hoboken Manufac-

beyond its statutory power in requiring the railroads to permit the use of their cars by Seatrain; that the Commission's decision was based upon a mistake of law in holding that the rail carriers were under duty to permit their cars to be used by Seatrain where through routes existed or were prescribed by the Commission; that the order is beyond the Commission's statutory power in requiring the rail carriers to permit the use of their cars by Seatrain, a carrier by water, and that neither the Interstate Commerce Act nor any other statute authorizes the Commission to require railroads to permit the use of their cars except by other railroads; that the order is void in that it requires the rail carriers to permit the use of their cars by Seatrain in and through a foreign country and in and through foreign waters; and that the order is in excess of the Commission's powers in that the rate of $1 per car per day for such period only when the cars are in Seatrain's actual possession is so low as to be confiscatory.

At the argument, it was suggested to the District Court by the parties that the case might be moot because Seatrain's vessels have been in Government service since February 1942, and Seatrain's service has been discontinued. See *Interstate Commerce Commission* v. *Hoboken Manu-*

turers' Railroad Company, Seatrain Lines, Inc., and the New Orleans & Lower Coast Railroad Company intervened in support of the order.

*facturers' Railroad Co.*, No. 43, October Term, 1943, decided December 6, 1943.

On October 9, 1943, the District Court rendered its decision sustaining the defendant-apellants except in its fourth and fifth conclusions of law which provided:

> 4. The said orders of the Commission are beyond the statutory power of the Commission insofar as they require petitioners to permit the interchange of their cars with and for the use of Seatrain for transportation in and through a foreign part and in and through foreign waters and neither the Interstate Commerce Act nor any other statute authorizes the Commission to require railroad carriers to permit such use of their cars.
>
> 5. The said orders of the Commission are based upon a mistake of law in that in making them the Commission erroneously assumed that petitioners were under a duty to permit the interchange of their cars with and for the use by Seatrain for transportation in and through a foreign part and in and through foreign waters, although petitioners were under no duty to permit their cars to be interchanged with and so used by Seatrain.

And, relying on *Federal Trade Commission* v. *Goodyear*, 304 U. S. 257, the Court held that the case was not moot.

On December 8, 1943, the District Court filed a supplemental opinion finding the $1 per diem

rate, applicable to cars in actual possession of Seatrain, prescribed by the Commission to be a just and reasonable rate, and not confiscatory. The Court's decree was entered on the same day.

The questions presented by this appeal are substantial. It involves an interpretation and application of the Interstate Commerce Act in relation to operations by Seatrain, which would put that company out of business, as the District Court itself recognized, when it said:

> We think we should state that we can see no practical way in which Seatrain can operate its ships between Hoboken and Belle Chasse without going outside of the territorial waters of the United States. We appreciate the effect which this ruling, if it be sustained by the appellate tribunal, must have upon Seatrain transportation. The remedy, however, must lie with Congress.

Aside from the situation of Seatrain, immediately affected, the decision of the lower court, if allowed to stand, would establish principles relating to and impinging upon the jurisdiction of the Commission, which would have a far-reaching effect. Since the decision appears contrary to prior decisions and principles announced by the Supreme Court (see, *e. g., St. Louis, B. & M. Ry. Co.* v. *Brownsville Nav. District,* 304 U. S. 295, 300; *Chicago, R. I. & P. Ry.* v. *United States,* 274 U. S. 29; *United States* v. *N. Y. Central R. Co.,* 272 U.

S. 451), it is important that the Supreme Court review this decision. However, the Court may, at least preliminarily, wish to order that the briefs and arguments be limited to the question of mootness. Such a procedure would avoid the necessity of reviewing a lengthy record and passing upon complicated issues of statutory construction,[7] in case it should be determined that the District Court erroneously held the case not to be moot[8] and that its decree should accordingly be reversed.

**E. Cases sustaining the Supreme Court's jurisdiction of the appeal**

*United States* v. *Chicago, Milwaukee, St. Paul & Pacific R. R. Co.*, 294 U. S. 499;

*United States* v. *Baltimore & Ohio Railroad Company*, 293 U. S. 454;

[7] It would also avoid the expenditures entailed in printing a voluminous record and wasted effort on the part of the Court and counsel, if the case is to be held moot.

[8] In this connection, it should be noted that there are pending in the United States District Court for the Southern District of New York, two actions brought by petitioner Pennsylvania Railroad for compensation for its freight cars delivered to Seatrain during the period from 1932 to 1942. *Pennsylvania Railroad Company* v. *Seatrain Lines, Inc. and Hoboken Manufacturers' Railroad Company*, Civil No. 6-414; *idem*, Civil No. 19-307. These cases have been held on the suspense calendar of the court and have not been brought to trial (as the result of stipulation and orders of the court), awaiting the determination of the Commission herein as to the measure of reasonable compensation, and pending the decision in the present action as to the validity of the Commission's determination and order.

*Florida* v. *United States*, 282 U. S. 194;

*Beaumont, Sour Lake & Western Railway Company* v. *United States*, 282 U. S. 74;

*Ann Arbor Railroad Company* v. *United States*, 281 U. S. 658;

*Louisville & Nashville R. R. Co.* v. *United States*, 238 U. S. 1;

*Interstate Commerce Commission* v. *Union Pacific Ry Co.*, 222 U. S. 541;

*New England Division Case*, 261 U. S. 184;

*Alton R. Co.* v. *United States*, 287 U. S. 229;

*United States* v. *Lowden*, 308 U. S. 225;

*Hudson & Manhattan R. Co.* v. *United States*, 313 U. S. 98;

*Interstate Commerce Commission* v. *Railway Labor Executives Association*, 315 U. S. 373; and *Interstate Commerce Commission* v. *Hoboken Manufacturers' Railroad Co.*, No. 43, October Term, 1943, decided December 6, 1943.

**F. Opinion and decrees of the District Court**

Appended to this statement are: (1) copies of the opinion, findings of fact and conclusions of law of the District Court dated October 9, 1943, and (2) copies of the supplemental opinion and final decree of said court sought to be reviewed, dated December 8, 1943.

We, therefore, respectfully submit that the Supreme Court of the United States has jurisdiction of the appeal.

Dated January 7, 1944.

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# In the District Court of the United States for the District of New Jersey

CIVIL No. 2092

THE PENNSYLVANIA RAILROAD COMPANY, ET AL.,
PETITIONERS

*vs.*

UNITED STATES OF AMERICA, DEFENDANT

AND

THE INTERSTATE COMMERCE COMMISSION, ET AL.,
INTERVENERS-DEFENDANTS

## OPINION

Before BIGGS, *Circuit Judge,* and FAKE and SMITH, *District Judges*

### FACTS

BIGGS, *Circuit Judge.*

The suit at bar was brought under the provisions of Acts of Congress approved June 18, 1910 (36 Stat. 539), March 3, 1911 (36 Stat. 1148) and October 22, 1913 (38 Stat. 219), 28 U. S. C. A., Secs. 41 (28) and 43 to 48 inclusive, by some fifteen trunk line rail carriers to set aside an order of the Interstate Commerce Commission entered by the Commission in its proceedings at

Nos. 25728 and 27878 on October 13, 1941. Though the amended petition complains of two other orders, they are supplementary to or in aid of the order of October 13, 1941, and therefore it is the order of October 13, 1941, with which we are really concerned. Since the case at bar requires extensive findings of fact we shall endeavor to reduce this opinion to essentials in an endeavor to make a complicated factual situation plain. The findings of fact filed with this opinion will state the facts more fully.

The order of October 13, 1941 [1] requires some fifty-two rail carriers, accordingly as they partici-

[1] As follows:

ORDER

No. 25728

*Hoboken Manufacturers Railroad Company* v. *Abilene & Southern Railway Company et al.*

No. 25878

*New Orleans and Lower Coast Railroad Company* v. *The Akron, Canton & Youngstown Railway Company et al.*

These proceedings being at issue upon complaints and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been made, and the Commission having, on the date hereof, made and filed a report on further hearing, containing its findings of fact and conclusions thereon, which said report together with the prior reports, 206 I. C. C. 328 and 237 I. C. C. 297, are hereby referred to and made a part hereof:

It is ordered, That the defendants listed in the appendix to said report on further hearing, according as they par-

pate in through-rail and water routes with Seatrain Lines, Inc., in interstate commerce between Belle Chasse (New Orleans), Louisiana, and Hoboken, New Jersey, to cease and desist from prohibiting the interchange of their freight cars with Seatrain. The order also requires the rail carriers to establish reasonable rules for freight car interchange with Seatrain at a per diem rate of $1.00 per day per car but provides also that the per diem is to be paid by Seatrain only for such periods of time as the cars are in its actual posses-

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ticipate in through routes with complainants and Seatrain Lines, Inc., in interstate commerce via Belle Chasse, La., and Hoboken, N. J., be, and they are hereby, notified and required to cease and desist on or before February 2, 1942, and thereafter to abstain from observing and enforcing their present rules, regulations, and practices which prohibit the interchange of their freight cars with complainants herein for transportation by Seatrain Lines, Inc., in interstate commerce.

It is further ordered, That said defendants, according as they participate in the through routes referred to in the next preceding paragraph, be, and they are hereby, notified and required to establish, on or before February 2, 1942, and thereafter to observe and enforce rules, regulations, and practices with respect to the interchange of freight cars with complainants for transportation by Seatrain Lines, Inc., in interstate commerce corresponding with the current code of per diem rules governing the interchange of freight cars between said defendants and other rail carriers, including the current rate of $1 per car per day: provided, however, that such per diem shall be payable by Seatrain Lines, Inc., only for such period as the cars are in its actual possession.

And it is further ordered, That this order shall continue in effect until the further order of the Commission.

sion. The Interstate Commerce Commission, Seatrain, New Orleans & Lower Coast Railroad Company, hereinafter referred to as Lower Coast, and Hoboken Manufacturers Railroad Company, hereinafter referred to as Hoboken Railroad, have intervened in this proceeding as parties defendant.

Seatrain is a common carrier by water subject to the Commission's jurisdiction. Investigation of Seatrain Lines, Inc., 195 I. C. C. 215. A description of the manner in which Seatrain operates is set out fully in an opinion of this court reported in 47 F. Supp. 779, at p. 781. Seatrain operates ocean going vessels having four decks, each deck in turn having four sets of standard-gauge railroad tracks. By means of a special loading device, consisting of a crane and cradle, provided at three ports (Hoboken, New Jersey, Belle Chasse, Louisiana, and Havana, Cuba), loaded freight cars with their contents are put on board Seatrain ships without breaking bulk and are thus transported in commerce. Seatrain's transportation usually takes the cars and their contents into the port of Havana, Cuba, en route to or from Hoboken or Belle Chasse. The loading facilities for Seatrain ships are located at Belle Chasse on the property of Lower Coast, a terminal-switching railroad, a subsidiary of the Missouri-Pacific Railroad Company, connecting in turn with the Southern Pacific and the Texas-Pacific Railroad Company. The loading facilities at Hoboken are located on the property of Hobo-

ken Railroad. Hoboken Railroad is a short, single-track terminal-switching line which runs along the water front of Hoboken and connects with the Erie Railroad, and via the Erie, with other trunk lines reaching New York harbor.

From 1929 to 1932 Seatrain and its predecessor company operated its ships between Belle Chasse and Havana exclusively. During this period most of the petitioners in the case at bar allowed their cars to be delivered freely to Seatrain ships to be delivered to Cuban railroads. In 1931 Seatrain contemplated the extension of its operations into interstate commerce by the use of the Port of New York and in 1932 made arrangements to effect that end with Hoboken Railroad. These arrangements are described at length in our prior opinion. See 47 F. Supp. at p. 783. Just prior to the inauguration of Seatrain's interstate service, the American Railway Association (to which trunk line railroads including the petitioners belonged) promulgated a car service rule which was intended to eliminate Seatrain as a competitor. The rule (Rule 4) provides, "Cars of railway ownership must not be delivered to a steamship, ferry or barge line for water transportation without permission of the owner filed with the Car Service Division."

The promulgation of this rule by the American Railway Association and the refusal of many of the petitioners to permit the delivery of their cars to Seatrain brought an immediate reaction. Ho-

boken Railroad and the Lower Coast filed two separate complaints with the Commission and attacked the refusal of the railroads to allow their freight cars to be used by Seatrain. Seatrain was permitted to intervene in both proceedings. The two complaints were subsequently consolidated and the consolidated cause has been before the Commission for hearings and argument on at least three different occasions. In 1935 the Commission held in its report in Investigation of Seatrain Lines, Incorporated, at No. 25565[2] (206 I. C. C. 328) that Seatrain was a common carrier by water and subject to the jurisdiction of the Commission; that the service of Seatrain between Hoboken and New Orleans was in the public interest and (most important of all insofar as the legal questions presented in this case are concerned) that where through routes existed between rail carriers and water carriers the Commission had jurisdiction to require rail carriers who were parties to such through routes to interchange cars with water carriers if such was the reasonable and appropriate method of interchanging traffic moving over such

[2] The report also embraced No. 25546, Application of Missouri-Pacific Railroad Company and Texas & Pacific Railway Company under Section 5 (19-21) of the Interstate Commerce Act in the Matter of Installation of Common-Carrier Service by Water Other Than Through Panama Canal, No. 25728, *Hoboken Manufacturers Railroad Company* v. *Abilene & Southern Railway Company*, and No. 25878, *New Orleans & Lower Coast Railway Company* v. *Akron, Canton & Youngstown Railway Company*.

through routes. The Commission stated, "We find nothing in the act imposing any duty upon or giving us jurisdiction to require a rail carrier to permit delivery of its cars to a water carrier where through routes between such rail and water carriers do not exist." The Commission also went on to say, "Whether defendants [including some of the petitioners in the case at bar] who refuse to permit delivery of their cars to Seatrain participate in through routes with Seatrain cannot be determined upon this record."

Thereafter, on January 28, 1938, in a proceeding at No. 25727, known as the "Seatrain Through-Route Case," *Seatrain Lines, Incorporated,* v. *Akron, Canton & Youngstown Railway Company* (226 I. C. C. 7), the Commission found that through routes existed between certain rail carriers (including some of the petitioners) in connection with Seatrain "between points in trunk-line and New England territories, on the one hand, and southwestern territory on the other hand"; "That the public interest requires the establishment and maintenance of through routes and joint rates" by certain trunk-line rail carriers (including the petitioners) in connection with Seatrain between designated points in official territory, and southwestern territory; and that these connections were in the public interest. The Commission then proceeded to prescribe maximum joint rates. These joint rates were modified following a further hearing

of the same proceeding in 1940 (243 I. C. C. 199) so as not to exceed the joint rates over comparable routes between rail carriers and break-bulk water lines. The latter, of course, do not use railroad cars on their ships. It is important to have in mind that The Pennsylvania Railroad and certain of the other petitioners thereupon established the through routes prescribed by the Commission and, as the amended petition alleges, those through routes are now in full force and effect.

The Commission reopened for further hearing the proceedings at Nos. 25728 and 25878, *Hoboken Manufacturers Railroad Company* v. *Abilene & Southern Railway Company*, and *New Orleans & Lower Coast Railroad Company* v. *The Akron, Canton & Youngstown Railroad Company*, to determine on what terms and conditions, including compensation, the petitioners should be required to interchange their freight cars with Seatrain. On October 13, 1941, after completing its hearings the Commission announced its final decision (248 I. C. C. 109) and entered the cease-and-desist order of October 13, 1941, complained of in this proceeding. The Commission reaffirmed its jurisdiction to require rail carriers, parties to through routes with Seatrain, to permit the use of their freight cars in Seatrain's service.[3] The Commission found

[3] As we have already stated, in its interstate commerce Seatrain usually carried cars destined for Belle Chasse or Hoboken to Havana, Cuba. This is a fact which is conceded by all the parties.

that the rail carriers' refusal to permit interchange of cars between themselves and Seatrain was a violation of the Interstate Commerce Act and that the current code of per diem rates governing the interchange of freight cars between the various railroads, including the current inter-railroad rate of $1.00 per day, should be payable by Seatrain, though only for such periods as the rail-carriers' cars were in its actual possession.[4] On the same day the order complained of was entered by the Commission.[5]

The petitioners contend that the order of October 13, 1941, should be set aside or at least mitigated for three reasons. First, they assert that there is no duty on rail carriers to deliver their freight cars for the use of, or to interchange their cars with, a water carrier and that the Commission has no authority to direct such delivery or interchange. Second, they contend that the Commission is without power to require rail carriers to permit their cars to be taken and used on ocean-going vessels of a water carrier for trans-

[4] Seatrain has no cars of its own though it has indicated its willingness to buy freight cars. It already rents a substantial number of privately owned cars.

[5] The Commission ordered the proceeding at No. 25565 to be discontinued, the proceedings at Nos. 25728 and 25878 to be dismissed without prejudice to the filing by Hoboken Railroad and Lower Coast of a petition for further consideration or for filing of new complaints after the proceeding at No. 25727 had been disposed of, if the situation then warranted such action.

portation from place to place in the United States, such transportation going into a foreign port and through foreign waters. They assert last that the compensation fixed by the Commission for the use of the rail carriers' freight cars by Seatrain is confiscatory and that the orders of the Commission "exempting" Seatrain from paying for the use of railroad cars held for acceptance by it (as distinguished from cars actually in its possession) are unreasonable and arbitrary.

## LAW

### I

The parties have suggested to the court that this case may be moot because of circumstances brought on by war. This point was raised, we believe, merely for the purpose of fully informing the court as to present conditions governing Seatrain's service. Without going into details as to the nature of this service, it is sufficient to state that the order of the Commission is presently in effect and that that order requires the petitioners not only to abstain from enforcing present rules, regulations and practices which prohibit the interchange of their freight cars for transportation by Seatrain in interstate commerce, but also requires the petitioners to establish on or before a specified date, and thereafter to observe, rules and regulations with respect to the interchange of their freight cars for transportation by Seatrain in interstate commerce.

We conclude that there is a justiciable controversy before this court within the purview of the Urgent Deficiencies Act, 38 Stat. 219, 28 U. S. C. A. Sec. 41 (28) and Secs. 43 to 48, inclusive. The Commission's order is a continuing one and embraces not only a negative duty upon the petitioners but requires affirmative conduct upon their part as well. Though the circumstances of Seatrain's service have been changed by the war, the case is not moot and the petitioners are entitled to a review of the order complained of. See *Federal Trade Commission* v. *Goodyear*, 304 U. S. 257, and the cases cited therein.

II

The petitioners contend that the history of the Interstate Commerce Act demonstrates that common carriers by rail have no duty to interchange cars with common carriers by water and the Commission has no power to direct interchange of cars between such carriers. If this be true the relief sought by the petitioners must be granted. To ascertain the correctness of this legal proposition a brief history of the Interstate Commerce Act and of some of the amendments to it is necessary.

Section 1 of the original Act of February 4, 1887, 24 Stat. 379, defined the term "railroad." We shall deal more specifically with other provisions of Section 1 at a later point, under heading III, of this opinion. Section 3 provided in part

that "Every common carrier subject to the provisions of this act shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines, * * *." The provisions quoted have remained in substance in the Act since 1887. Section 12 set forth the duties of the Commission which were largely those of an investigatory body.

The Hepburn Act of June 29, 1906, 34 Stat. 584, increased the powers of the Commission and made it to some extent a regulatory as well as an investigatory body. The Hepburn Act also enlarged the definition of a railroad to include water carriers when both are used for continuous carriage or shipment in interstate commerce. The term "railroad" was defined to include the facilities required for "transportation" and the term "transportation" was itself defined so as to include cars. Section 1 of the Hepburn Act provided that it should "be the duty of every carrier subject to the provisions of this Act * * * to establish through routes and just and reasonable rates applicable thereto." The Hepburn Act required connections between lateral or branch-line railroads and trunk line carriers and required cars to be furnished for the movement of through

traffic. The Commission was not expressly given the power to compel carriers to exchange cars.

The Mann-Elkins Act of June 18, 1910, 36 Stat. 539, 545, again amended the Interstate Commerce Act. Section 7 of the Mann-Elkins Act broadened the definition of "transportation" as contained theretofore in Section 1 of the Interstate Commerce Act. The section also provided that the carriers subject to the Act should establish through routes with applicable rates and make reasonable rules and regulations with respect to the "exchange, interchange and return of cars" used on such through routes.

The Interstate Commerce Act was amended further by the Esch Car Service Act of May 29, 1917, 40 Stat. 101. This statute employed the term "car service" which it defined as including the "exchange, interchange and return of cars" used by any carrier subject to the provisions of the Interstate Commerce Act. It required every carrier subject to the Interstate Commerce Act to establish reasonable rules and regulations for car service used in connection with through routes and specifically gave the Commission power to establish reasonable rules and practices in respect to car service if a carrier failed to do so. It also provided a penalty to be imposed if a carrier refused to comply with orders or directions of the Commissioner as to car service. The Commission was empowered by general or special order to require all carriers to file rules and regulations in

respect to car service and also was given power, "* * * after hearing, on a complaint or upon its own initiative without complaint [to] establish reasonable rules, regulations and practices with respect to car service, * * *."

The petitioners take the position that even the Esch Car Service Act did not expressly impose on carriers by railroad a duty to exchange cars and did not impose any duty on carriers by rail to exchange cars with carriers by water. They contend further that the Esch Car Service Act did not give the Commission authority to require such service of them. These contentions cannot be sustained for the contrary clearly appears from the express words of the Esch Car Service Act. After the passage and approval of the Esch Car Service Act the Commission had the power to compel the exchange, interchange and return of cars between carriers subject to the Act. Since rail carriers and water carriers were subject to the Act, the Commission had the power to compel the interchange of cars between a rail carrier and a water carrier such as Seatrain.

An important change was worked in the Interstate Commerce Act by the Transportation Act, 1920, 41 Stat. 456. Section 400 (4) of Title IV of the Transportation Act, 1920, amended Section 1 of the Interstate Commerce Act and provided that every common carrier subject to the Interstate Commerce Act should establish through

routes and reasonable rates applicable thereto, should provide reasonable facilities for operating through routes and should make reasonable rules and regulations with respect to the operation of such through routes. It will be noted that the express provision of the Mann-Elkins Act which required common carriers subject to the Interstate Commerce Act "* * * to make reasonable rules and regulations with respect to the exchange, interchange, and return of cars * * *" to be employed in connection with through routes, was omitted from the Transportation Act, 1920, in favor of the provisions of the next referred to.

Section 402 of the Transportation Act, 1920, amended the paragraphs added to Section 1 of the Interstate Commerce Act by the Esch Car Service Act to read, in part, as follows:

> (10) The term "car service" in this Act shall include the use, control, supply, movement, distribution, exchange, interchange, and return to locomotives, cars * * * by any carrier by railroad subject to this Act.
>
> (11) It shall be the duty of every carrier by railroad subject to this Act to furnish safe and adequate car service and to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service; * * *
>
> * * * * *
>
> (13) The Commission is hereby authorized by general or special orders to require

all carriers by railroad subject to this Act, or any of them, to file with it from time to time their rules and regulations with respect to car service, and the Commission may, in its discretion, direct that such rules and regulations shall be incorporated in their schedules showing rates, fares, and charges for transportation, and be subject to any or all of the provisions of this Act relating thereto.

(14) The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by carriers by railroad subject to this Act, including the compensation to be paid for the use of any locomotive, car, or other vehicle not owned by the carrier using it, and the penalties or other sanctions for nonobservance of such rules, regulations or practices.

The petitioners lay particular emphasis on the provisions of Section 1 (10) (11) (13) and (14) of the Interstate Commerce Act as amended by the Transportation Act and point out that it became the duty of "every carrier by railroad" to furnish safe and adequate "car service." The petitioners argue that since the "car service" provisions of the Act as amended expressly imposed the duty to furnish car service on carriers by railroad and did not impose that duty on carriers by water (the Mann-Elkins Act having expressly imposed

this duty on rail and water carriers alike), rail carriers were required, after the enactment of the Transportation Act, 1920, to interchange their cars only with rail carriers and not with water carriers. In short, the petitioners contend that despite the fact that water carriers as well as rail carriers were then subject to the provisions of the Interstate Commerce Act and were required to establish through routes, the duty of car service was limited by the Transportation Act, 1920, to carriers by railroad who were required only to exchange cars with carriers by railroad. The petitioners assert that their argument is strengthened by the fact that while Section 402 (13) of the Transportation Act expressly conferred on the Commission the power to compel a carrier by railroad to furnish its lines with adequate facilities for fulfilling the requirement of car service imposed by the Transportation Act, 1920, it gave no like power to the Commission to compel water carriers to supply such facilities, and that, therefore, it was the intention of Congress not to compel the exchange of cars between carriers by rail and carriers by water.

The Transportation Act of 1940, 54 Stat. 898, recast the Interstate Commerce Act. Provisions respecting railroads were put in part I; those relating to motor carriers, in part II; and those affecting water carriers were placed in part III.

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Part III, commonly called the Water Carrier Act, 49 U. S. C. A. §§ 901, *et seq.*, Section 2 (c) of the Transportation Act of 1940, 49 U. S. C. A. Sec. 1 (4), amended Section 1 (4) of the Interstate Commerce Act. Subsections 10, 11, and 13 of Section 1 of the Interstate Commerce Act remained unchanged by the amendments of the Transportation Act of 1940, 49 U. S. C. A. Sec. 11 (10), (11), and (13). Subsection (14) of Section 1 of the Interstate Commerce Act was altered. Section 1 (14) (a), reads as follows, "The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by common carriers by railroad subject to this part, including the compensation to be paid and other terms of any contract, agreement, or arrangement for the use of any locomotive, car, or other vehicle not owned by the carrier using it (and whether or not owned by another carrier), and the penalties or other sanctions for nonobservance of such rules, regulations, or practices."

The petitioners contend that the Transportation Act of 1940 and in particular those provisions just quoted, makes it clear that they have no duty to interchange cars with a carrier by water, and that the Commission possesses no power to compel them to do so; that the duty to interchange cars with carriers by water imposed on them by the

Esch Car Service Act and allegedly obliterated by the amendment to the Interstate Commerce Act embodied in the Transportation Act, 1920, were not reimposed upon them. They concede that Section 1 (4), 49 U. S. C. A. § 1 (4), requires the establishment of through routes by carriers by rail with carriers by water, but they go no further.

Putting aside the prior decisions of the Commission and of the courts[6] which are not helpful

[6] We think that we need not discuss the decision of the Interstate Commerce Commission in *Missouri and Illinois Coal Co.* v. *Illinois Central R. Co.*, 22 I. C. C. 39, decided in 1911 and cited with approval by the Supreme Court in 1931 in *Chicago, Rock Island & P. Ry. Co.* v. *United States*, 284 U. S. 80, 91. The Interstate Commerce Commission in the cited case had before it Section 7 of the Mann-Elkins Act of June 18, 1910, 36 Stat. 539, 545, which specifically provided as we have stated that it was the duty of every common carrier subject to the provisions of the Act, not only to provide reasonable facilities for operating through routes but also "* * * to make reasonable rules and regulations in respect to the exchange, interchange and return of cars used therein, * * *." We have not discussed such decisions as *Colorado Coal Traffic Ass'n* v. *C. & S. Ry. Co.*, 24 I. C. C. 618, or *Omaha Grain Exchange* v. *Great Northern Ry Co.*, 47 I. C. C. 532, decided respectively in 1912 and 1917, for similar reasons. These are cases in which the Commission reiterated its authority to require car interchange between carriers by railroad where they were parties to through routes. The provisions of Section 7 of the Mann-Elkins Act were applicable when the first case was decided and those of the Esch Car Service Act, 40 Stat. 101, were pertinent in the latter case. For substantially similar reasons we have omitted also any discussion of such cases as *Flour City C. C. Co.* v. *Lehigh Valley R. Co.*, 24 I. C. C. 179, decided in 1912, and *Chat-*

in view of the present form and substance of the Interstate Commerce Act and restricting ourselves to the words of the Interstate Commerce Act, we are unable to agree with the contentions of the petitioners for the reasons which follow.

Section 1 (1) (a) of the Act, 49 U. S. C. A. § 1 (1) (a), provides that the provisions of part I shall apply to common carriers engaged in the transportation of property "* * * partly by railroad and partly by water when both are used under * * * [an] arrangement for a continuous shipment * * *." The word "both" as used is a term of art. It means that the provisions of part I except where expressly inapplicable by reason of specific terms in some of its sections, are made to apply to common carriers by water where they are engaged in transporting goods as part of the continuous shipment in cooperation with a carrier by railroad.

Section 1 (3) (a), 49 U. S. C. A. § 1 (3) (a), defines the term "common carrier" as including all persons "engaged in such transportation as aforesaid as common carriers for hire." The

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*tanooga Packet Co.* v. *Illinois Central R. Co.*, 33 I. C. C. 384, decided in 1915.

We shall not deal with the provisions of the Panama Canal Act of August 24, 1912, 37 Stat. 568, in this phase of our decision because that portion of it remaining in the Interstate Commerce Act (Section 6 (11), 49 U. S. C. A. § 6 (11)) is more pertinent to the subject considered under the next heading of this opinion.

transportation previously described is that set out in Section 1. Section 1 (3) (a) defines transportation as including "* * * cars * * * and other vehicles * * *, and all instrumentalities and facilities of shipment * * *, irrespective of ownership * * *."

Section 1 (4), 49 U. S. C. A. § 1 (4), provides: "It shall be the duty of every common carrier subject to * * * [part I] to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this part to establish reasonable through routes with common carriers by water subject to part III, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers."

The petitioners and Seatrain are subject to the provisions of part I of the Act since they perform transportation services of the kind described in Section 1 (1) (a). Such carriers are required to furnish "transportation" which may include cars as specified by Section 1 (3) (a) needed for the maintenance of through routes. Carriers by railroad are expressly required by Section 1 (4) to establish through routes with carriers by water and the subsection provides also that "every such common carrier [by rail or by water engaged in continuous shipments] * * * establishing through routes to provide reasonable facilities for operating such routes * * *." Cf. Section 305 (b), 49 U. S. C. A. § 905 (b), relating fo carriers by water under part III.

We think that it follows that rail carriers are required by the Interstate Commerce Act to supply cars which may go upon the lines of other carriers, including carriers by water, as may be necessary for the maintenance of through routes for continuous shipments at least insofar as the transportation takes place within the United States or its territorial waters. This is so because of the definition of "transportation" contained in Section 1 (3) (a) and because of the further fact that cars indubitably are "facilities" of carriage as described in Section 1 (4). Cf. *Tank Car Corp.* v. *Terminal Co.*, 308 U. S. 422.[7]

[7] It must be noted that the Supreme Court and Mr. Justice Roberts, the author of the opinion in the cited case,

Such is the duty of common carriers by rail, but that is not to say that Congress has given the Commission authority to compel reluctant carriers to fulfill this duty. To ascertain the authority of the Commission in this respect it is necessary to turn to the "car service" provisions of the Act. Subsection 10 of Section 1 defines the term "car service" as including the use, control, supply, movement and distribution of cars. Subsection (11) provides that it shall be the duty of "every carrier by railroad" subject to part I to furnish car service. The subsection is notably silent in that it does not state to what carriers (subject to part I) the rail carriers shall supply car service. As we have already indicated, common carriers by water are subject to the provisions of part I upon the existence of the specified conditions of continuous carriage and through routes. We think therefore that carriers by railroad are required to exchange cars with carriers by water where both carriers are engaged in the transportation of property under an arrangement for continuous shipment on through routes. Subsection (13) authorizes the Commission "by general or special orders to require all carriers by railroad" subject to part I to file rules

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were construing the provisions of Section 15 (13) of the Act, 49 U. S. C. A. Sec. 15 (13) which relates to the allowance to the owner of property transported who furnishes an instrumentality for the transportation. But referring to 49 U. S. C. Sec. 1 (3), Mr. Justice Roberts said, 308 U. S. 428, "Freight cars are facilities, as defined by the Act."

and regulations with the Commission in respect to car service, and, in the Commission's discretion, to direct that these rules and regulations shall be incorporated in the rail carriers' schedules. Subsection 14 (a) gives the Commission authority on a complaint or upon its own initiative without a complaint, to establish rules and regulations and practices in respect to car service.[8] We think that it is clear that in view of the provisions of subsections (13) and (14) (a) that the Commission possesses the power to require carriers by railroad to supply common carriers by water with cars when necessary to effect transportation by rail and water routes for continuous shipment over through routes in interstate commerce insofar as that transportation takes place within the United States or its territorial waters.

Broad construction is required. A "National Transportation Policy" was declared by the sections preceding Sections 1, 201, and 301 of the Interstate Commerce Act, 49 U. S. C. A. §§ 1, 301, and 901, added by the Transportation Act of 1940. Congress intended the Act to develop, coordinate, and preserve "a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal

[8] See also subsections (15), (17) (a) and (21). These subsections are auxiliary to and in aid of subsections (10) to (14), inclusive.

Service, and of the national defense." The National Transportation Policy as stated by Congress requires all of the provisions of the Interstate Commerce Act to be "administered and enforced" with a view to carrying out this intention.

III

The petitioners also take the position that the Commission is without power to require rail carriers to permit their cars to be taken and used on the ocean-going vessels of a carrier by water such as Seatrain, through foreign waters, the vessels of the carrier by water docking during the course of the voyage at a foreign port. The facts are not in dispute. Seatrain carries cars of the petitioners from Hoboken, New Jersey, to Belle Chasse, Louisiana, and from Belle Chasse to Hoboken, frequently operating by way of Havana, Cuba. Graham M. Brush, president of Seatrain, made the character and scope of Seatrain's operations very plain. His testimony is set out in the margain.* The Commission found, 226

*See p. 21 of the transcript in I. C. C. Docket No. 25565, which was made part of the record in I. C. C. Docket No. 25728 and No. 25878 (I. C. C. Tr. 240–6; Exhibit 36).

Mr. Brush testified in this connection as follows:

"Q. Your ships are now operating in what service or in what services, Mr. Brush?

"A. Our present operation is from New York to Havana, thence to New Orleans, returning from New Orleans to Havana to New York; the ships leaving New York and

I. C. C. 7, 13–14, that "* * * the undisputed facts are that the ordinary route of Seatrain between Hoboken and Belle Chasse is via Havana; that over such route the vessels operate in part through foreign waters and touch a foreign port; that occasionally the call at Havana is omitted, in which instances the route is in part outside the territorial waters of the United States; that when the vessels call at Havana, cars containing interstate freight are placed under United States customs seals at the port of departure and remain so until arrival at the port of destination, and the freight contained in such cars is not made accessible to the Cuban authorities; that three sets of manifests are made out at the port of departure, one required by the Cuban authorities and another required by the United States customs relate to freight for Cuba, and the third, which shows only the cars moving in interstate commerce, is given the Cuban customs inspector as a matter of information; that no Cuban official

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clearing for the foreign ports, entering Havana and again clearing from Havana for a foreign port.

"Q. What is the length of the voyage from New York to Havana?

"A. In time the voyage is three and a half days under the present operating schedule from New York to Havana, a distance of approximately 1200 nautical miles.

"Q. And from Havana to New Orleans?

"A. From Havana to New Orleans the running time is approximately two days, a distance of 600 nautical miles.

"Q. In those voyages do your ships go out to sea?

"A. Yes, sir. * * *

has ever attempted to take jurisdiction over the interstate freight; and that there are no Cuban regulations affecting Seatrain's operations, but its vessels while at Havana are subject to all Cuban laws and regulations, such as those relating to quarantine and health, applicable to vessels of foreign register." It is conceded that Seatrain transports a very substantial number of empty cars, routing them preferably by Havana, in the hope that there they may pick up loads.

The Commission based its jurisdiction to require the petitioners to deliver their cars to Seatrain for transportation on its routes via Havana, on the provisions of what was formerly Section 6 (13) (b) of the Interstate Commerce Act, read in conjunction with former Section 5 (19)[10] of the Act. The Commission held that the phrase used in Section 6 (13) "through the Panama Canal or otherwise" was the equivalent of the phrase employed in Section 5 (19), "through the Panama Canal or elsewhere." Section 5 (14) prohibits the ownership or control by a railroad of a competing water carrier operating "through the Panama Canal or

[10] Paragraph (b) of subsection (13) of Section 6 was repealed by the Transportation Act of 1940. See 54 Stat. 910 and Section 6 (11) of the present Act, 49 U. S. C. A. § 6 (11). Subsection (11) was incorporated in the Transportation Act of 1940 and by it was made part of the present Interstate Commerce Act. See Section 5 (14), 49 U. S. C. A. § 5 (14). These provisions were part of the Panama Canal Act of 1912. See Sections 6 (13) (b) and (11) of the Act of August 24, 1912, c. 390, 37 Stat. 566.

elsewhere." We think that the Commission's conclusion that the phrase of Section 6 (13) has the same meaning as that quoted from Section 5 (19), is correct.[11] The Commission has repeatedly construed Section 5 (19) as being applicable to carriers by water operating to or via foreign ports (see *New Orleans and Havana Car Ferry Service*, 188 I. C. C. 371) and did so in the Seatrain Through Route Case before the Transportation Act of 1940 was enacted.

The respondents assert that the provisions of old Section 6 (13) (b) were in substance reenacted and broadened by Section 15 (3) and Section 307 (d), 49 U. S. C. A. §§ 15 (3) and 907 (d), of the Interstate Commerce Act as constituted after the enactment of the Transportation Act of 1940. The respondents go a step further, however. They take the position that Sections 1 (4) and 3 (4) of the Interstate Commerce Act, 49 U. S. C. A. §§ 1 (4) and 3 (4) as constituted by the Transportation Act of 1940, gave carriers by water the benefit of the obligations imposed upon carriers by railroad. The Interstate Commerce Commission took a similar view in the rehearing at No. 25728. See 248 I. C. C. 109.

Section 302 (d), 49 U. S. C. A. § 902 (d), defines a "common carrier by water" as "any person which holds itself out to the general public to engage in the transportation by water in inter-

[11] Compare *Chicago, R. I. & P. Ry. v. United States*, 274 U. S. 29.

state or foreign commerce of passengers or property * * *."

Section 302 (i), 49 U. S. C. A. § 902 (i), defines "interstate or foreign transportation" or "transportation in interstate or foreign commerce" as used in part III as transportation of property "(2) partly by water and partly by railroad * * *, from a place in a State to a place in any other State; except that with respect to such transportation taking place partly in the United States and partly outside thereof such terms shall include transportation by railroad * * * only insofar as it takes place within the United States, and shall include transportation by water only insofar as it takes place from a place in the United States to another place in the United States; * * *" Do the words of subparagraph (i) (2) extend the jurisdiction of the Commission to transportation throughout its whole course from a place to a place within the United States despite the fact that that course of transportation transverses extra-territorial waters and goes into a foreign port? We conclude that this was the intention of Congress. We think therefore that the Commission has jurisdiction over transportation such as that carried on by the petitioners and Seatrain, from state to state in the United States, throughout the whole course of that transportation even if it passes through foreign waters and into foreign ports. But the fact that the Commission has

jurisdiction of such transportation does not necessarily mean that the Commission can compel carriers by railroad to provide carriers by water with cars for routes passing through extraterritorial waters and into a foreign port.[12] What must be our conclusions as to this question?

As we have already stated, part III of the Interstate Commerce Act deals primarily with carriers by water. It expressly contemplates the establishment of through routes by common carriers by water with common carriers by railroad. See Section 305 (b), 49 U. S. C. A. § 905 (b), which repeats with one very pertinent exception, referred to hereinafter, the substance of Section 1 (4), part I of the Act. Section 305 (b) provides that common carriers by water are required "* * * to provide reasonable facilities for operating such through routes, * * *," i. e., to provide facilities for operating through routes with carriers by railroad. Section 302 (l), 49 U. S. C. A. § 902 (l), provides that the term "common carrier by railroad" means "a common carrier by railroad subject to the provisions of part I." In short, the "common carriers by railroad" referred to in Section 305 (b), with which it is the duty of common carriers by water to establish through routes, are the common carriers by railroad defined in and subject to the provisions of

[12] Compare the decision of the Supreme Court in *Chicago R. I. & P. Ry.* v. *United States*, 274 U. S. 29, which was based on old Section 6 (13) (b).

Part I. Section 1 (1) of part I defines the transportation to which the provisions of part I are applicable as the transportation of property partly by railroad and partly by water under arrangement for a continuous shipment "from any place in the United States through a foreign country to any other place in the United States * * *, but only in so far as such transportation takes place within the United States." This limitation placed upon the nature of the transportation embraced by Section 1 (1) does not limit the definition of transportation contained in Section 302 (i) (2). This is obvious for the scope of the transportation defined in part III, Section 302 (i) (2) is much broader than the concluding phrase of Section 1 (1). But the common carriers by railroad subject to part III are those which, by express definition, are subject to the provisions of part I, and if cars are to be gotten from carriers by railroad for the use of carriers by water, it must be by virtue of the provisions of part I. Does it follow, therefore, that the car service provisions of the Act, subsections (10) to (14) of Section 1 of part I are applicable to compel common carriers by railroad to interchange cars with common carriers by water *only* for the transportation defined in Section 1 (1); that is to say, for such transportation as takes place within the United States or its territorial waters? This is the gist of the question now before us.

We held under heading II that a common carrier by railroad has the duty to interchange cars with common carriers by water when necessary for the operation of an integrated transportation system as required by the National Transportation Policy declared by Congress. The transportation there dealt with was transportation within the United States or its territorial waters, viz, that described in Section 1 (1) of part I of the Act. We are dealing now with the transportation carried on by Seatrain in conjunction with the petitioners under arrangements for continuous carriage or shipment from place to place in the United States but through extraterritorial waters and via the port of Havana. Conceding that the provisions of the Interstate Commerce Act are entitled to the broad interpretation which is necessary to effect the National Transportation Policy stated by Congress, should we reach the conclusion that the provisions of the Act compel carriers by railroad to furnish cars to carriers by water for such transportation?[13]

[13] We are not unmindful of the decisions of the Commission referred to in note 11, supra, or to that of the Supreme Court in *Chicago, R. I. & P. Ry.* v. *United States*, 274 U. S. 29. In the case last cited the Supreme Court held only that paragraph 13 of Section 6 of the Interstate Commerce Act read in conjunction with paragraph 4 of Section 15 of the Act (both sections being part of the Panama Canal Act as it existed prior to the enactment of the Transportation Act of 1940) gave the Commission power to compel a carrier by railroad to

Are there other provisions of parts I or III of the Act that will compel the petitioners to furnish cars to Seatrain for Seatrain's extraterritorial transportation? The respondents point to the provisions of Section 305 (b) and the words of that subsection which require common carriers by water to establish through routes with common carriers by railroad "and to provide reasonable facilities for operating such through routes * * *." But, assuming that cars are to be considered as facilities of transportation under this section, the duty is one which is imposed only upon carriers by water and not upon carriers by railroad. The sentence of Section 1 (4), "It shall be the duty of every such common carrier [by railroad and water] * * * to provide reasonable facilities for operating such

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embrace in a through route by rail and water, through the Panama Canal, the transportation of passengers and of freight. The decision did not deal at all with any requirement of car service. Contrast the decision of the Supreme Court in *St. Louis, etc., Ry. Co.* v. *Brownsville Dist.*, 304 U. S. 295, 300, decided in 1938. In the cited case, Mr. Justice Butler, after setting out the car service provisions of the Interstate Commerce Act as they existed prior to the passage of the Transportation Act of 1940 (unchanged by the latter Act except as to Section 6 (14), stated, "The Act extends to transportation only so far as it takes place in this country. Petitioners are not bound by any law, regulation or tariff to furnish cars for transportation in Mexico." The Supreme Court, however, was dealing only with transportation by rail and not with transportation by rail and water.

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[through] routes * * *" is absent from Section 305 (b) and there is therefore no conjoint duty imposed by it on carriers by railroad and carriers by water. The respondents therefore cannot maintain any position on the strength of the contents of Section 305 (b).

Does the Panama Canal Act as now constituted in part I, Section 6 (11), 49 U. S. C. A. Sec. 6 (11), serve to support the respondents' position and that of Hoboken Railroad? The latter company lays particular emphasis on the provisions of the Panama Canal Act and has constructed a singular ingenious argument in aid of its point of view. It points to the provisions of Section 6 (11) as they now exist,[14] and in particular to that clause of the first paragraph which says when

[14] Section 6 (13) of the Panama Canal Act as amended by the Transportation Act, 1920, provides, "When property may be or is transported from point to point in the United States by rail and water through the Panama Canal or otherwise, * * * the Interstate Commerce Commission shall have jurisdiction of such transportation and of the carriers, both by rail and by water, which may or do engage in the same, in the following particulars, in addition to the jurisdiction given by the Act to regulate commerce, as amended June eighteenth, nineteen hundred and ten:

"(a) To establish physical connection between the lines of the rail carrier and the dock at which interchange of passengers or property is to be made * * *

"(b) To establish through routes and maximum joint rates between and over such rail and water lines, and to determine all the terms and conditions under which such lines shall be operated in the handling of the traffic embraced."

the transportation is from point to point in the United States by rail and water through the Panama Canal or otherwise, and not entirely within the limits of a single State, the "* * * Commission shall have jurisdiction of such transportation and of the carriers, both by rail and by water, which may or do engage in the same, in addition to the jurisdiction given by * * *" the Interstate Commerce Act as amended, "* * * in the following particulars * * *", viz., those set out in subparagraphs (a) and (b). The Hoboken Railroad lays emphasis on the phrase "in addition to the jurisdiction given by * * *" the Interstate Commerce Act and contends that these words enlarge the powers given to the Commission under the Act. This is true, but that enlargement of jurisdiction goes only to the particulars set out in subparagraphs (a) and (b). Subparagraph (a) deals with the establishment of physical connection between the lines of the rail carrier and the dock of the water carrier. Subparagraph (b) requires the establishment of proportional rates between the rail carrier and the water carrier. There is no aid here for the respondents. The fact is that the Panama Canal Act has been emasculated. If the statute stood as it did in former Section 6 (13) (b) and the Commission had retained the power "* * * to determine all the terms and conditions under which such lines [rail and water] shall be operated in the handling of the traffic embraced * * *"

the respondents' position would be a much stronger one.

Another argument can be made, however, which perhaps, will indicate with some sharpness the issue of statutory interpretation presented for our determination. Section 303 (a), 49 U. S. C. A. § 903 (a) provides: "In the case of transportation which is subject both to this part and part I, the provisions of part I shall apply only to the extent that part I imposes, with respect to such transportation, requirements not imposed by the provisions of this part." These are words of limitation. They mean that the provisions of part I shall be applicable to transportation subject both to parts III and I only to the extent that part I makes them applicable.

Turn again to Section 1 (1). May it be said that if transportation by rail to the port of ship-loading (say Hoboken) and transportation by rail from the port of ship-unloading (say Belle Chasse) takes place within the United States, carriers by railroad *must* interchange cars with Seatrain at these points, the whole of the ensuing transportation by water (most of which takes place outside the territorial waters of the United States), becoming subject to all of the provisions of part I, those of Section 1 (4) as well as the car service provisions contained in Section 1 (10), (11), (13), and (14)? In other words, should Section 1 (1) be construed as if some such phrase

as "by rail" were inserted between the words "transportation" and "takes" in its final clause?

We think that there are several answers to this argument. The first is that the last clause of Section 1 (1), "but only insofar as such transportation takes place within the United States * * *" modifies the whole sentence of which it is a part and therefore must be deemed to limit the application of the provisions of part I to transportation "from any place in the United States through a foreign country to any other place in the United States." The clause of limitation certainly does not limit only the phrase immediately preceding it. Second, the provisions of Section 1 (1) by its own terms applies to transportation of property "partly by railroad and partly by water" and therefore it is manifestly improper to insert some such phrase as "by rail" as we have suggested. Such an interpretation would amount to rewriting the statute. Last, Section 1 (2), 49 U. S. C. A. Sec. 1 (2), reiterates the identical limitation enunciated in Section 1 (1) and does so unqualifiedly.

It may be argued that the phrase of Section 1 (1), "from any place in the United States through a foreign country to any other place in the United States," possesses little meaning when read with the clause of limitation. With this we may agree. The original Act to Regulate Commerce, 24 Stat. 379, while it made use

of the phrase "from any place in the United States through a foreign country to any place in the United States," contained no phrase of limitation such as that under consideration. In the Act of June 29, 1906, 34 Stat. 584, amending Section 1 of the Interstate Commerce Act, the phrase last quoted was used again without any words of limitation. The clause of limitation was brought into the Act by Section 400 of the Transportation Act, 1920, 41 Stat. 474. We can find no legislative history which informs us adequately why it was inserted, but we must give to it the effect which we think Congress intended.[15]

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[15] We have been unable to find any legislative history adequately explaining the inclusion of the clause "• • • but only insofar as such transportation takes place within the United States," first found in Section 400 (1) of the Transportation Act, 1920, 41 Stat. 474. We have examined those portions of the Congressional Record which report the discussions of the bills originally introduced in the Senate and in the House of Representatives. The House and Senate bills did not contain the clause. Both the Senate and the House submitted bills which did not contain the clause to the Conference Committee. The Conference Report sets out the clause under consideration for the first time. See House Report No. 650 to accompany H. R. 10453 (66th Congress, 2d Session, 59th Cong. Rec. Part III, pp. 3043 et seq.). The report of the Committee contains no explanation for the clause. We have been unable to find any transcript of hearings before the Conference Committee. Available indices contain no reference to such hearings and their absence indicates that there were none.

We can find no textbook which deals with this particular clause, and we have been unable to find any pertinent discussion in any law review article.

The following discussion, which relates to the similar

We conclude that it means precisely what it says however inconsistent its provisions may seem when read with the phrase "from any place in the United States through a foreign country to another place in the United States." The effect of the limitation is to restrict the operation of the provisions of part I of the Interstate Commerce Act to transportation taking place within the

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provision of what became Section 400 (2) of the Transportation Act, 1920, took place in the House of Representatives on November 14, 1919. See 58 Cong. Rec. p. 8256.

"Mr. EDMONDS. Mr. Chairman, I would ask the chairman of the committee a question. I move to strike out the last word.

"On page 39, sections (a) and (b), is it the intention of the committee to include our foreign commerce under the Interstate Commerce Commission, or to make rates and supervise and regulate?

"Mr. ESCH. That does not change the existing law. It has been the law for years.

"Mr. EDMONDS. That is true; but has the Interstate Commerce Commission operated in foreign Commerce?

"Mr. ESCH. No. Its jurisdiction would not extend beyond the 3-mile limit anyhow.

* * * * *

"The gentleman will find the limitation as to transportation over which the committee has exercised jurisdiction on line 3, page 40, to the effect insofar as such transportation and transmission takes place within the United States. The words "within the United States" would not permit it to go beyond the 3-mile limit.

"Mr. EDMONDS. That does not apply then, as I understand it, to the transportation of passengers or property outside the 3-mile limit?

"Mr. ESCH. No."

The discussion quoted related as we have stated to the provision of subparagraph (2) of Section 400 of the Trans-

United States. It follows that the provisions of Section 1 (4) and Section 1 (10), (11), (13), and (14), the car service provisions, are applicable to transportation "only insofar as such transportation takes place within the United States." To conclude that the provisions of part I apply throughout the whole of a course of transportation, which, though it goes from place to place within the United States, in part moves outside of the United States and its territorial waters, would be casuistry.

We can find no provision in the Interstate Commerce Act that imposes a duty upon carriers by railroad to exchange cars with carriers by water engaging as does Seatrain in transportation through extraterritorial waters and through a foreign port and we can find nothing in the Act which

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portation Act, 1920, viz, "The provisions of this Act shall also apply to such transportation of passengers and property * * *, but only insofar as such transportation * * * takes place within the United States." The specific clause of subparagraph (1) was not included in the bill at the time the discussion took place, but it would seem that it must have been the intention of Congress to attribute the same meaning to identical clauses. Congressman Esch thought that the jurisdiction of Congress did not "go beyond the 3-mile limit" in respect to foreign commerce and that this view was generally accepted by his colleagues. Would it not follow, therefore, that the clause of subparagraph (1) should be given the same limiting effect? See the dissenting opinion of Mr. Esch, as a Commissioner of Interstate Commerce in *International Nickel Company* v. *Director General*, 66 I. C. C. 631.

authorizes the Commission to impose such a duty on the petitioners.[16]

The Commission's order must be read against the background of the record. The record is clear as to the nature and extent of transportation of cars by Seatrain beyond the United States and its territorial waters. We have decided that the provisions of the Interstate Commerce Act do not compel the petitioners to interchange cars with Seatrain for such service, nor do they confer authority upon the Commission to compel such interchange. Insofar as the order of the Commission relates only to transportation within the United States or its territorial waters, it will be sustained. Insofar as it serves to compel the petitioners to interchange cars with Seatrain for transportation beyond the United States and its territorial waters, in foreign waters or to a foreign port, it must be modified and limited.[17]

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[16] We are not unmindful of the rule of the ship's flag and that the nationality of American flag vessels by rule of law, comity and practice of nations remains that of the United States. See Taylor, International Public Law, Section 268. The doctrine, however, will not serve to extend the jurisdiction of the Interstate Commerce Act or the authority of the Commission.

[17] We think we should state that we can see no practical way in which Seatrain can operate its ships between Hoboken and Belle-Chasse without going outside of the territorial waters of the United States. We appreciate the effect which this ruling, if it be sustained by the Appellate Tribunal, must have upon Seatrain transportation. The remedy, however, must lie with Congress.

In reaching these conclusions we have endeavored to give to the Interstate Commerce Act the broadest justifiable construction in view of the intention of Congress as declared in the National Transportation Policy. We cannot legislate, however.

What we have said renders it unnecessary to discuss the last point raised by the petitioners; the question of whether the compensation fixed by the Commission for the use of the petitioners' cars is confiscatory.

An order may be submitted.

Findings of fact and conclusions of law are filed with this opinion in accordance with Rule 52 (a) of the Rules of Civil Procedure, 28 U. S. C. A. following § 723c.

JOHN BIGGS, Jr.,
*United States Circuit Judge.*

GUY L. FAKE,
*United States District Judge.*

WILLIAM F. SMITH,
*United States District Judge.*

OCTOBER 9, 1943.

Filed Oct. 9, 1943, at 11 o'clock A. M. William H. Tallyn, Clerk.

## FINDINGS OF FACT

1. This suit is brought under the provisions of Title 28, United States Code, Sections 41 (28) and 43–48, inclusive, to enjoin, set aside, annul, and suspend orders of the Interstate Commerce Commission which require certain railroads, including petitioners, to permit the interchange of their cars wth Seatrain Lines, Inc. The said orders were entered in the Commission's Docket No. 25728, *Hoboken Manufacturers Railroad Company* v. *Abilene & Southern Railway Company et al.*, and its Docket No. 25878, *New Orleans & Lower Coast Railroad Company* v. *The Akron, Canton & Youngstown Railway Company et al.*, and are as follows:

Order of October 13, 1941, which incorporates therein the Commission's report of the same date, 248 I. C. C. 109, together with its prior reports of February 5, 1935, 206 I. C. C. 328, and January 8, 1940, 237 I. C. C. 97;

Order of March 2, 1942, which denied various petitions indicated therein; and

So much of the order of the Commission of February 5, 1935, dismissing the complaints in said Docket Nos. 25728 and 25878 as incorporates and makes a part thereof Finding 6 in its report of the same date, 206 I. C. C. 328, 344.

2. All of the petitioners are common carriers of property by railroad subject to the Interstate Commerce Act, were defendants in the proceedings before the Interstate Commerce Commission in said Dockets Nos. 25728 and 25878, and are parties to the said orders entered by the Commission therein.

3. The United States of America is made a defendant herein by virtue of said statutes. The Interstate Commerce Commission, Hoboken Manufacturers Railroad Company, New Orleans & Lower Coast Railroad Company, and Seatrain Lines, Inc., intervened as defendants herein.

4. The Hoboken Manufacturers Railroad is a single-track terminal-switching line extending along the water front of Hoboken, N. J., a distance of 1.632 miles and connecting, at its northern end, with the Erie Railroad and through the Erie with other trunk lines reaching New York Harbor. In addition to its main line, the Hoboken has numerous yard tracks and sidings, a freight house, and team tracks. It serves numerous piers, at which various steamship lines regularly dock, and about 20 industries.

5. New Orleans & Lower Coast Railroad Company, a corporation of the State of Louisiana, herein sometimes called the Lower Coast, is a common carrier by railroad and makes the physical connection with the dock at which vessels of Seatrain receive and deliver railroad cars at Belle Chasse, La., and acts as an intermediate switching

railroad between Seatrain and the trunk line railroad carriers at New Orleans. It is an affiliate of Seatrain.

6. Seatrain Lines, Inc., is a common carrier by water subject to the Commission's jurisdiction. (*Investigation of Seatrain Lines, Inc.*, 195 I. C. C. 215.) Since October 6, 1932, Seatrain has operated vessels, on which it transports freight in railroad cars, between Hoboken, N. J., and Belle Chasse, La., via Havana, Cuba. Belle Chasse is on the west bank of the Mississippi River about 17 miles south of New Orleans. The method of interchanging freight with Seatrain is described in *Investigation of Seatrain Lines, Inc.*, 195 I. C. C. 215, 219.

7. The Seatrain vessels could not operate without the loading devices that make possible the transfer of cars between the tracks of the vessels and the tracks of the Hoboken and of the New Orleans & Lower Coast, or without the use of railroad cars, or without the cooperation of the railroad at each of these terminals.

8. From January 1929 to October 6, 1932, Seatrain and its predecessor operated vessels in foreign service between New Orleans (Belle Chasse), Louisiana, and Havana, Cuba, transporting freight in railroad cars on vessels and interchanging cars with Cuban railroads at Havana. During this period cars of all railroads, including petitioners', were delivered to Seatrain or its predecessor for movement from New Orleans to Havana without

objection by petitioners or other owners. 18,159 loaded cars moved over this route, upon which per diem at the per diem rates of the American Railway Association was paid to the owning roads by the Lower Coast for the time the cars were in its possession and that of Seatrain or the Cuban railroads. During that period there was no car-service rule requiring the consents of the owners of cars for their delivery to Seatrain.

9. In 1932, Seatrain entered into negotiations with the railroads serving New York Harbor, including petitioner The Pennsylvania Railroad Company, regarding the possibility of a service between New York Harbor and New Orleans via Havana for which Seatrain would construct two new vessels. No objection was made by the railroads to the interchange of their cars with Seatrain and the railroads expressed their desire that Seatrain should inaugurate the proposed service. Seatrain caused two new vessels to be constructed for this service and arranged for a New York Harbor terminal at Hoboken on the tracks of the Hoboken Manufacturers Railroad. In September 1932 a conference was had between the officials of Seatrain and the Chairman of the Car Service Division of the American Railway Association in regard to the interchange of cars. It was represented by the Chairman of the Car Service Division that the Hoboken, like the Lower Coast, would have to be responsible for the payment of per diem on cars delivered to Seatrain and that

if Seatrain should enter into a contract to reimburse the Hoboken for per diem and to handle cars in accordance with the Car Service Rules the interchange of cars of railroads, members of the Association, with Seatrain would be permitted. Such contract was entered into between Seatrain and the Hoboken.

10. Prior to October 6, 1932, when Seatrain began operating in service between Hoboken, N. J., and Belle Chasse, La., via Havana, Cuba, to wit: on or about October 3, 1932, petitioners, The Pennsylvania Railroad Company and The Long Island Rail Road Company, and other carriers by railroad had notified the Hoboken and Seatrain, respectively, in writing not to deliver, accept, or use their cars in Seatrain service.

11. The American Railway Association was an association of railroads each of which was a subscriber to an agreement known as the Car Service and Per Diem Agreement under which the subscribers thereto agreed to abide by the Codes of Car Service and Per Diem Rules promulgated by the Association. The American Railway Association on November 15, 1932 promulgated, effective as of that date, Car Service Rule 4 which had been adopted by the members thereof, reading as follows:

> Cars of railroad ownership must not be delivered to a steamship, ferry or barge line for water transportation, without permission of the owners, filed with the Car Service Division.

Subsequent to November 1933, the American Railway Association was, by consolidation, succeeded by the Association of American Railroads. The petitioners herein, and also Hoboken Manufacturers Railroad Company and New Orleans & Lower Coast Railroad Company, interveners-defendants herein, are and were subscribers to the Car Service and Per Diem Agreement by which they agree and agreed to abide by the rules promulgated by the American Railway Association and its successor, the Association of American Railroads. Petitioners herein have not given their permission for the delivery of their cars to Seatrain for use between Hoboken and New Orleans.

12. Following the promulgation of Rule 4 the Hoboken, on December 30, 1932, filed with the Commission a complaint, known as Docket No. 25728, *Hoboken Manufacturers Railroad Co.* v. *Abilene & Southern Ry. Co., et al.,* and on March 9, 1933, the New Orleans & Lower Coast Railroad filed with the Commission a similar complaint, Docket No. 25878. Both complaints were consolidated by the Commission and the hearings therein were had on one record. Both complaints alleged that Car Service Rule 4 was unlawful under Section 1 (4) and (11), and other sections, of the Interstate Commerce Act.

13. A petition by Seatrain for intervention was submitted on November 2, 1933, and was allowed on the record and filed in said consolidated pro-

ceeding. Said petition alleged that Seatrain "is a common carrier by water engaged in the transportation of freight in railroad cars partly by railroad and partly by water between Hoboken, New Jersey, and Belle Chasse (New Orleans), Louisiana, and between each of these ports and Havana, Cuba." Seatrain therein adopted and realleged as its own the allegations of the complaints in Docket Nos. 25728 and 25878, and joined in and adopted the prayers for relief contained therein. After the said intervention was allowed and before any testimony was taken, the defendants therein moved to dismiss the complaints therein on the ground that the Commission was without authority to grant the relief sought and was without jurisdiction of the matters complained of. Thereafter testimony was taken on November 2, 3, and 4, 1933, and thereafter and on or about March 30, 1934, the Examiner issued his report in which he concluded that the Commission should find that it had no jurisdiction of the matter in controversy and that even if the Interstate Commerce Act could be construed as conferring jurisdiction, the rules, regulations, and practices assailed were not unreasonable, unduly prejudicial, or otherwise unlawful, and that the complaints should be dismissed.

14. Following extensive hearings, the filing of briefs and oral arguments, on February 5, 1935, the Commission decided the consolidated Dockets

Nos. 25728 and 25878. The Commission rejected the conclusions of the Examiner and made the following pertinent findings:

(a) Seatrain's vessels are designed primarily for the handling of railroad cars in non-break-bulk transportation, and the cooperation of railroads is essential to their successful operation.

(b) For its supply of railroad cars, Seatrain depends in part upon contracts with the New Orleans & Lower Coast Railroad, a wholly owned subsidiary of the Missouri Pacific and of the Texas & Pacific Railroad Company.

(c) The only through routes that Seatrain has been able to establish between Hoboken and points to the Southwest are via the lines of the Missouri Pacific and the Texas & Pacific and some of their short-line connections. Both the Missouri Pacific and the Texas & Pacific have a direct and active interest in the operation of Seatrain in that thereby they are afforded through routes by water between points in the Southwest and points on the Atlantic Seaboard, in competition with similar routes afforded by subsidiaries of the Southern Pacific Company.

(d) Where the rates are substantially the same the traffic will ordinarily move all rail because of the faster service and other advantages, whereas if the rail-water rates are substantially less than the all-rail rates the traffic will move over the rail-water routes, unless shorter time in transit or some other factor requires all-rail service.

(e) The Seatrain's policy has been to maintain rates no higher than those charged by the break-bulk water lines and its service thus affords the same advantage of lower rates as the break-bulk lines. The Seatrain has advantages over the latter because of its more expeditious service, and because of its non-break-bulk service, enabling it to handle all traffic that rail carriers can handle.

(f) One of its disadvantages is that transportation of Seatrain takes longer, usually from 1 to 7 days between representative points, than all-rail routes.

(g) It is manifest from this and other evidence of record that the all-rail routes actively compete with the break-bulk water-routes and that Seatrain with its many advantages and no disadvantage over the break-bulk water-routes, can more effectively compete with the all-rail routes.

(h) The operation of Seatrain is in the public interest and is of advantage to the convenience and commerce of the people.

15. In this decision in respect to transportation between United States ports and Cuba, the Commission said:

> We have no jurisdiction over the rates and practices of Seatrain in its strictly foreign commerce between United States ports and Cuba. There is nothing of record to indicate that its rates and practices respecting foreign commerce are used as cloaks or devices for according to shippers engaged

in both foreign and interstate commerce concessions from the tariff rates applicable to interstate commerce.

16. The report of the Commission discusses Car Service Rule No. 4, the practices of the carriers thereunder, and shows that as of March 1933, 26 railroads had consented to the delivery of their cars to Seatrain without restriction; several others had granted such consent with restriction, but that most of the railroads had refused to permit delivery of their cars to the Seatrain. The Commission further stated that "No railroad had refused to permit delivery of their cars to any of the other 11 water lines listed in a circular of the Association as coming within the intendment of the rule."

17. In this report the Commission found that the sole object of Car Service Rule No. 4 "is to prevent the diversion of traffic from the all-rail routes to Seatrain" and that for four years prior to the inauguration of this service cars were delivered to Seatrain or to its predecessor Overseas for movement from New Orleans to Havana without objection by any of the railroads, during which time 18,159 loaded cars moved over that route.

18. In this report the Commission also found that Rule 4 is not strictly observed by the Hoboken and New Orleans & Lower Coast Railroad Companies.

19. Finding No. 6 of the Commission reads as follows: "That we have jurisdiction to require

the establishment of through routes between rail and water carriers, and, where such through routes are established pursuant to our order or voluntarily, to require the rail carriers parties thereto to interchange cars with the water carrier, if that is the reasonable and appropriate method of interchanging traffic moving over such through routes."

20. The Commission in its report discussed the question as to whether it had any jurisdiction over the interchange of cars with Seatrain, reviewed pertinent provisions of the Interstate Commerce Act, decisions of the Commission and of the courts thereunder, amendments made to the Act over a period of years and the broadening of the control of the Commission over rail-and-water transportation, and reached the conclusion that it had the authority to require the interchange of cars by the rail defendants with Seatrain. The Commission concluded that it had jurisdiction to require the establishment of through routes between rail-and-water carriers and where such through routes are established, pursuant to its order or voluntarily, to require the rail carriers parties thereto to interchange cars with the water carrier if that is the reasonable and appropriate method of interchanging traffic moving over such through routes.

21. The Commission found in its report that the record showed that Seatrain lines participated in through routes and joint rates with the Missouri

Pacific and the Texas & Pacific Railroad Companies, but added "whether defendants who refuse to permit delivery of their cars to Seatrain participate in through routes with Seatrain cannot be determined upon this record." It directed attention to the fact that whether such through routes exist and, if not, whether they should be established are issues in No. 25727, not yet decided.

22. On or about February 20, 1935, the defendants in Docket Nos. 25728 and 25878 filed their petition with the Commission for a reconsideration of Finding No. 6 in its report of February 5, 1935, 206 I. C. C. 328, and of the legal conclusions upon which the Commission based its order of the same date. On April 1, 1935, the Commission entered its order denying the said defendants' petition.

28. The report of the Commission of February 5, 1935, referred to, relied upon, and adopted parts of its prior report dated July 11, 1933, in its Docket No. 25565, 195 I. C. C. 215, and in particular the following findings therein: "Upon consideration of the evidence, we are of the opinion and find (1) that Seatrain Lines, Incorporated, is not a common carrier by railroad or an extension of a line of railroad within the meaning of those terms as used in the act, (2) that Seatrain Lines, Incorporated, is a common carrier by water engaged in the transportation of property partly by railroad and partly by water, that Seatrain Lines, Incorporated, and the Hoboken Manufacturers

Railroad Company are used under a common control, management, and arrangement for continuous carriage or shipment of property in railroad cars, in interstate and foreign commerce, that Seatrain Lines, Incorporation, and the New Orleans & Lower Coast Railroad Company are used under a common arrangement for such continuous carriage, and, therefore, that Seatrain Lines, Incorporated, is subject to all the provisions of the act applicable to such a carrier, (3) that Seatrain Lines, Incorporated, is not a 'carrier' within the meaning of section 20a of the act, and (4) that the Hoboken Manufacturers Railroad Company does not and may not compete for traffic with Seatrain, and therefore neither is subject, because of any community of interest between them, to the provisions of section 5 (19–21) of the act." Docket No. 25565 was an investigation by the Commission in a proceeding entitled "Investigation of Seatrain Lines, Inc.," instituted on its own motion October 4, 1932, prior to the inauguration by Seatrain of its service between Hoboken, N. J., and Belle Chasse, La., via Havana, Cuba, with a view to determining the lawfulness thereof and in said proceeding Seatrain and Hoboken Manufacturers Railroad Company were made respondents.

24. In the case entitled *Seatrain Lines, Inc.*, v. *Akron, C. & Y. Ry. Co.*, Docket No. 25727, the primary relief sought by Seatrain was an order requiring the establishment of through routes with

the railroads operating in the East, South, and Southwest where such through routes do not already exist, and the establishment of joint rates in connection with such through routes. This case, following full hearings, was decided January 28, 1938, and is reported in 226 I. C. C. 7. In this case, so far as here material, the Commission found that through routes existed in connection with the Seatrain between points in trunk line and New England territories on the one hand and Southwestern territory on the other, and that the public interest required the establishment and maintenance of through routes and joint rates in connection with Seatrain between certain portions of official territory on the one hand and Southwestern territory and a portion of southern territory on the other. It is not denied that the rail defendants, including some of the petitioners in this case, established the through routes so prescribed in Docket No. 25727, and now participate therein as directed by said order, and that said through routes are now in full force and effect.

25. By motion dated July 20, 1938, and filed with the Commission jointly by the Hoboken as complainant and Seatrain as intervener in Nos. 25728 and 25878, said Hoboken and Seatrain sought an order therein requiring the defendants therein, including petitioners herein, to permit their cars to be used in Seatrain service. A similar motion dated July 26, 1938, was filed therein by the Lower Coast. The reply, dated July 29,

1938, of the Pennsylvania Railroad Company and certain other petitioners herein to said motions asserted that the Commission was without authority to enter the order requested, but without waiving such contention, urged that, if the Commission should adhere to its opinion that it had such authority, a further hearing would be necessary in order that appropriate compensation might be fixed for such use of railroad-owned cars in Seatrain service, and that without prior compensation or responsible assurance of such compensation an order of the Commission requiring such interchange of cars would contravene the requirements of due process under the Fifth Amendment to the Constitution of the United States.

26. By its order of November 21, 1938, the Commission reopened Nos. 25728 and 25878 "for further hearing to determine upon what terms and conditions (including compensation) defendants should be required to interchange their cars with intervener Seatrain Lines, Inc." Thereafter further hearings were held in 1939 and on January 8, 1940, the Commission made its Report on Further Hearing, 237 I. C. C. 97, wherein it clarified the issues and again reopened the proceedings for further hearing, which was had in 1940.

27. After full hearing following the reopening, on October 13, 1941, the Commission made its Second Report on Further Hearing in Docket Nos. 25728 and 25878 and on the same day entered

its final order in which there were incorporated its said Second Report, 248 I. C. C. 109, and its Reports of February 5, 1935 (206 I. C. C. 328) and January 8, 1940 (237 I. C. C. 97).

28. In its report on further hearing in Dockets Nos. 25728 and 25878, the Commission considered the issue as to what terms and conditions, including compensation, should be required in the interchange of cars with Seatrain, reaffirmed its earlier conclusion that it had jurisdiction to require the railroads to interchange their cars with Seatrain when through routes between Seatrain and rail carriers exist, pointed out that in addition to the amount of compensation which the rail defendants should receive for use of their cars by Seatrain, other terms and conditions were in issue, upon which evidence has not been received, and, therefore, the proceedings should be reopened.

29. The Commission issued a second report on further hearing, 248 I. C. C. 109, dated October 13, 1941, wherein it again affirmed its conclusion that it had power to require the rail defendants to permit use of their cars by Seatrain.

30. The Commission found that Seatrain had offered to acquire cars for interchange with the railroads if desirable from the standpoint of car supply of the country, and that it also rents a substantial number of privately owned cars. For almost 4 years prior to the inauguration of its coastwise service, the railroads freely inter-

changed cars with Seatrain and its predecessor in the Belle Chasse-Havana service. Moreover, a large number of railroads operating in official and southwestern territories, some of which are defendants in these proceedings, have voluntarily consented to the delivery of their cars to Seatrain. Also, 19 defendants which have not consented to the use of their cars by Seatrain in its coastwise traffic permit such use in its Cuban traffic.

31. With respect to the contention that in furnishing equipment for transportation beyond the United States over the Florida East Coast Railroad Company, the rail carriers violated Sections 3 (1) and 3 (4) of the Act, the Commission overruled these claims stating: "We therefore adhere to the view that we have no power to make a finding which directly or indirectly would require defendants to turn over their cars to complainants for use by Seatrain in its Cuban traffic."

32. The ultimate findings of the Commission based on subsidiary findings, before referred to, were in part: "1. We find that the defendants in these proceedings listed in the appendix, according as they participate in through routes with complainants and Seatrain, have failed to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operations, in violation of section 1 (4) of the Interstate Commerce Act, by refusing

to agree to the interchange of freight cars owned by them with complainants for delivery to Seatrain for use in interstate commerce between points in the United States.

33. On October 13, 1941, the Commission entered an order, which after referring to its reports in 206 I. C. C. 328, 237 I. C. C. 297 and 248 I. C. C. 109, read as follows:

> *It is ordered,* That the defendants listed in the appendix to said report on further hearing, according as they participate in through routes with complainants and Seatrain Lines, Inc., in interstate commerce via Belle Chasse, La., and Hoboken, N. J., be, and they are hereby, notified and required to cease and desist on or before February 2, 1942, and thereafter to abstain from observing and enforcing their present rules, regulations, and practices which prohibit the interchange of their freight cars with complainants herein for transportation by Seatrain Lines, Inc., in interstate commerce.
>
> *It is further ordered,* That said defendants, according as they participate in the through routes referred to in the next preceding paragraph, be, and they are hereby, notified and required to establish, on or before February 2, 1942, and thereafter to observe and enforce rules, regulations, and practices with respect to the interchange of freight cars with complainants for transportation by Seatrain Lines, Inc., in inter-

state commerce corresponding with the current code of per diem rules governing the interchange of freight cars between the said defendants and other rail carriers, *Provided, however,* That such per diem shall be payable by Seatrain Lines, Inc., only for such period as the cars are in its actual possession.

*And it is further ordered,* That this order shall continue in effect until the further order of the Commission.

The order has been subsequently amended to become effective October 5, 1942. The Commission has denied various applications of the petitioners for a reconsideration and clarification of its order.

34. On April 15, 1942, the amended petition was filed by plaintiffs in this case, and in it it was alleged that the Commission's order is void and beyond its statutory power in requiring the railroads to permit the use of their cars by Seatrain; that the Commission's decision was based upon a mistake of law in holding that the rail carriers were under duty to permit their cars to be used by Seatrain where through routes existed or were prescribed by the Commission; that the order is beyond the Commission's statutory power in requiring the rail carriers to permit the use of their cars by Seatrain, a carrier by water, and that neither the Interstate Commerce Act nor any other statute authorizes the Commission to require rail-

roads to permit the use of their cars except by other railroads; that the order is void in that it requires the rail carriers to permit the use of their cars by Seatrain in and through a foreign country and in and through foreign waters; and that the order is in excess of the Commission's powers in that the rate of $1 per car per day for such period only when the cars are in Seatrain's actual possession is so low as to be confiscatory.

It was also alleged that the Commission erred in refusing to overrule certain rulings by its examiner and that the order is void in imposing obligations upon the petitioners but does not run against or impose any obligations on Seatrain, with respect to its use of, or for the return of, cars of petitioners. The New Orleans & Lower Coast and Seatrain Lines, Inc., were permitted to intervene, and answers were filed by the United States, the Interstate Commerce Commission and intervening defendants, denying the material allegations of the amended petition.

35. A three-judge court was convened pursuant to the provisions of the statute, 28 U. S. C. A. § 41, and the court has jurisdiction to entertain and pass upon the issues involved in this case.

36. The entire record upon which the Commission's report and order of October 13, 1941, is based has been introduced and is before the court for its consideration in reaching a decision herein.

CONCLUSIONS OF LAW

1. The case is not moot.

2. The Commission acted within its statutory power in requiring the railroads to permit the use of their cars by Seatrain insofar as such transportation is within the United States or its territorial waters.

3. The Commission did not base its decision upon a mistake of law in holding that the rail carriers were under duty to permit their cars to be used by Seatrain where through routes existed or were prescribed by the Commission insofar as such through routes are within the United States or its territorial waters. In requiring the rail carriers to permit the use of their cars by Seatrain, a carrier by water, the Commission did not exceed the authority conferred upon it by statute.

4. The orders of the Commission are beyond the statutory power of the Commission insofar as they require petitioners to permit the interchange of their cars with and for the use of Seatrain for transportation beyond the United States and its territorial waters, in extraterritorial waters, or to a foreign port. Neither the Interstate Commerce Act nor any other statute authorizes the Commission to require carriers by railroad to permit such use of their cars.

5. The orders of the Commission are based upon a mistake of law in that in making them the Com-

mission assumed erroneously that the petitioners were under a duty to permit the interchange of their cars for the transportation referred to in the preceding paragraph.

JOHN BIGGS, JR.,
*United States Circuit Judge.*

GUY L. FAKE,
*United States District Judge.*

WILLIAM F. SMITH,
*United States District Judge.*

OCTOBER 9, 1943.

Filed October 9, 1943, at 11 o'clock, A. M. William H. Tallyn, Clerk.

# In the District Court of the United States for the District of New Jersey

CIVIL NO. 2092

THE PENNSYLVANIA RAILROAD COMPANY, ET AL., PETITIONERS

*vs.*

UNITED STATES OF AMERICA, DEFENDANT

AND

THE INTERSTATE COMMERCE COMMISSION, ET AL., INTERVENERS-DEFENDANTS

## OPINION ON ARGUMENT IN RESPECT TO FORM OF FINAL DECREE

Before BIGGS, *Circuit Judge*, and FAKE and SMITH, *District Judges*

BIGGS, *Circuit Judge*.

In our original opinion we stated that the conclusions reached by us rendered it unnecessary to discuss the last point raised by the petitioners; the question of whether the compensation fixed by the Commission for the use of the petitioner's cars is confiscatory. Counsel for Seatrain has now suggested the possibility, however impractical, that Seatrain might be able to maintain

routes from Hoboken to Belle Chasse entirely within the United States and its territorial waters.[1] If this be the case, the issue of whether the compensation fixed by the Commission for the use by Seatrain of the petitioners' cars is confiscatory is not moot. There is also the consideration that if on appeal our decision that the Commission was without authority to compel the petitioners to interchange their cars with Seatrain for transportation beyond the United States and its territorial waters should be reversed, a remand would be necessary to permit this court to decide the issue of confiscation. We feel, therefore, that we should decide it now.

The order of the Commission imposes on Seatrain an obligation to pay to the petitioners $1 per day for each car supplied by them to Seatrain but provides also that this rate shall be paid by Seatrain only for the period in which the car is in the actual possession of Seatrain. The Commission thus has relieved Seatrain of the obligation to compensate the petitioners for the period of time during which a car may be held by Seatrain's connecting railroad carriers because there is no ship immediately available to receive the car at Hoboken or at Belle Chasse. The nature of this exception in Seatrain's favor is made plain by an

[1] There is no evidence in the record from which an opinion in respect to this question can be formed. Navigation maps and similar documents of which we may take judicial notice seem to indicate that such routes would be impractical.

examination of Rule 15 of the Car Service and Per Diem Agreement of the trunk line carriers. The rule is set out below.[2]

As the Commission states, there are two faces to the problem. See *Hoboken Mfrs. R. Co. v. Abilene & S. Ry. Co.*, 248 I. C. C. 117–119. The Commission points out that the period of detention of cars before acceptance by Seatrain, longer in fact than the period of detention required by railroad, is the consequence of the nature of Seatrain's operation, ships sailing less frequently than trains run. Seatrain might well be obliged to assume the obligations imposed by its method of operation. But, as the Commission says, Seatrain's position in respect to car detention is analogous to that of the break-bulk carriers by water. The disability of the break-bulk water carriers to accept merchandise promptly in all instances is reflected in the demurrage rates and presumably also in the rail rates and divisions applicable to traffic between them and the railroads. The Commission concludes that Seatrain's car detentions are properly a matter for consideration in connection with the rates and divisions to be made between Seatrain and the petitioners rather than in determining the per diem rate which Seatrain should pay. The result, as the

[2] The pertinent provisions of Rule 15 are as follows: "(a) A road failing to receive promptly from a connection cars on which it has laid no embargo, shall be responsible to the connection for the per diem of the cars so held for delivery, including the dome cars of such connection."

Commission points out, will be, or should be, much the same in either event for if the railroads are relieved by per diem payments by Seatrain of the burden of car detention which they bear on traffic interchanged with the break-bulk lines, the railroads will "* * * be entitled to relatively lower divisions of through rail-water rates with Seatrain than with the break-bulk lines, or to relatively lower local or proportional rates to or from the ports where the through rates are made on combination." The Commission goes on to state that, "Considerable difficulty, however, would be encountered in making any such adjustment. From a practical point of view, therefore, the simple and desirable way of handling the matter is to leave the burden of car detention with * * * (the petitioners) when traffic is interchanged with Seatrain just as when it is interchanged with the break-bulk lines." The finding set out below followed.[2]

A careful consideration of the record and the briefs of the parties convinces us that the determination of the per diem rate and of its method of application rested with the Commission in the

[2] The pertinent finding of the Board was as follows:

"2. We find further that the current code of per diem rules governing the interchange of freight cars between the defendants above referred to and other rail carriers, including the current rate of $1 per day payable by Seatrain for such period as the cars are in its actual possession, would be reasonable for application to the interchange of cars between defendants and complainants for use by Seatrain."

exercise of its expert administrative judgment. We conclude that the per diem rate and the condition of its application are not confiscatory or even unreasonable. The rate and the condition of its application as ordered by the Commission in fact are not confiscatory even if petitioners' cars be carried from Hoboken to Belle Chasse via Havana. The per diem rate is applicable throughout the whole of the time that the cars are upon the Seatrain ships. The nonpayment of the per diem rate during detention periods at Hoboken and Belle Chasse forms the substance of the petitioners' complaint.[1] We think that the findings and conclusions of the Commission have an adequate basis in the facts and in the law.

Additional findings of fact, additional conclusions of law and the final decree are filed with this opinion.

_____ _____,
*United States Circuit Judge.*

_____ _____,
*United States District Judge.*

_____ _____,
*United States District Judge.*

DECEMBER , 1943.

[1] As we have indicated, as we construe the Commission's opinion, findings and order, the Commission would permit Seatrain to transport the petitioners' cars by through routes from Hoboken to Belle Chasse and from Belle Chasse to Hoboken via Havana, the cars remaining on the Seatrain ships at Havana, and not entering into commerce on Cuban railroads.

## ADDITIONAL FINDINGS OF FACT

1. The Commission's report of October 13, 1941, considered the question of what compensation the railroad defendants required to interchange their cars with Seatrain should receive for the use of such cars, and what other terms and conditions should be imposed. It pointed out that the Association of American Railroads published rules governing the settlement of railroad-owned freight cars between all common-carrier railroads, known as the Code of Per Diem Rules, Rule 1 of which provided that the rate for the use of freight cars shall be $1 per car per day, and that this has been the per diem rate for many years and is supposed to reflect the average cost, to the owner, of freight-car ownership and maintenance, and embraces cost of repairs, cost of taxes, cost of replacements, miscellaneous expenses and 6 percent interest on the investment.

2. The Commission's report on further hearing points out that the reasonableness of the per diem rate is not here questioned insofar as it applies between the railroads; that Seatrain is willing to pay that rate, although believing that the cost of maintenance is less when the cars are in its possession, because they are not in motion and therefore are not subject to the stress incidental to train movements, and are, in some degree, protected

from the elements. The Association and defendants contended that repairs are responsible for a large proportion of the cost of car ownership, and the railroad defendants conceded that about 61.5 percent of the average running-repair expenses of 16 cents per car per day, or about 9.8 cents, are avoided when cars are not moving. The carriers' claim that this saving was more than offset by the corrosive effect of the ocean atmosphere on steel cars was considered by the Commission and rejected.

3. The Commission's report on further hearing, in discussing the rail carriers' contention that the Seatrain should pay per diem not only for the time the car was actually in its possession but in addition that an allowance for the time in which the car is idle or unproductive should be made, found that the record in this case showed that the present cost of ownership and maintenance did not exceed the average of $1 per car per day for the period in which the cars were actually in service, concerning which contention the Commission said:

> A similar burden results from the fact that many cars must return empty after moving under load. While foreign lines pay per diem to the car owner for such empty movements over their rails, such receipts are offset by corresponding payments to the foreign lines.

4. The Commission found that Seatrain had offered to acquire cars for interchange with the rail-

roads if desirable from the standpoint of car supply of the country, and that it also rents a substantial number of privately owner cars. Even as between railroads themselves, the Commission found that there is no such thing as balancing of burdens, and that not all railroads own cars. It further found that ownership is not always proportionate to car use. Further findings of the Commission in the report last referred to on this question were stated as follows:

> The car-hire rules do not differentiate between railroads because of such differences in conditions. It is also the fact that these rules have always been applied uniformly where cars are interchanged voluntarily with water lines such as the various so-called car ferries. For almost 4 years prior to the inauguration of its coastwise service, the railroads freely interchanged cars with Seatrain and its predecessor in the Belle Chasse-Havana service, at the regular per diem rate. Moreover, a large number of railroads operating in official and southwestern territories, some of which are defendants in these proceedings, have voluntarily consented to the delivery of their cars to Seatrain at that rate.
>
> In all of the circumstances, we find no good reason why Seatrain should pay a higher per diem rate than the #1 now applied uniformly by the car-hire rules, especially when the record shows, and it is admitted, that the cost of maintaining the cars

is decreased approximately 10 cents per day while they are in its possession.

5. At Belle Chasse, the Lower Coast has a tariff providing that it will receive cars from connecting railroads for movement over Seatrain only upon written delivery orders from Seatrain and then only subsequent to 12:01 a. m. of the day prior to the scheduled sailing date from that point. In this way the Lower Coast obligates itself to pay only 1 day's per diem, for which it is reimbursed through the payment to it by its line-haul rail connections of a switching reclaim averaging 54 cents per car under the prevailing per diem rule governing the payment of reclaims to an intermediate switching road.

6. At New Orleans, when carload freight is interchanged with a break-bulk steamer, there must be unloading from the railroad cars and when the traffic moves on joint water-rail rates the line-haul railroads perform this work, which fact is taken into account in determining their divisions. This detention may be somewhat less than that of the cars interchanged with Seatrain, totalling 2.58 days as compared with 3.3 days per car in the case of interchange with Seatrain. The periods used in arriving at these averages were not the same.

7. In the case of the interchange at Hoboken, there is no controversy with the line-haul railroads, including the New York Central, the Erie, the Delaware, Lackawanna & Western, the Central Railroad of New Jersey and the Lehigh Valley.

These companies have entered into an agreement with complainants before the Commission under which they undertake to assume the per diem charges and other expenses of detention of cars held at Hoboken awaiting delivery to Seatrain. The Pennsylvania Railroad, however, has had a controversy of long standing with the Hoboken involving the payment of per diem and reclaims on Seatrain traffic prior to January 1, 1937.

8. The report on further consideration finds that payment of rental for use of freight cars by railroads other than those owning the cars has been an established transportation practice for over 70 years; that under the system of per diem charges now in force, the line-haul rail carrier using the cars of another pays the owner according to the time covered by its use of the car; that the fact or the amount of the payment is not conditioned on the profitability of that use; that a break-bulk water carrier does not have occasion to use railroad cars and accordingly is not required to pay per diem rental; that Seatrain's operation is anomalous in that it requires the use of railroad freight cars, and that the purpose of the complaints is to permit it to use railroad cars owned by others upon terms comparable to railroad cars available generally. The Commission concluded:

> We have found that it is entitled to the privilege of such use, and on the theory stated above, it should also be willing to assume the obligations incident thereto.

9. The Commission in its report on reconsideration recognized that while in cases where the detention was one attributable to Seatrain's mode of transportation, in one view of the matter the rail carriers should not be compelled to assume the cost of this detention, but pointed out that

> On the other hand, it is clear that, on traffic interchanged with the break-bulk lines, defendants bear a burden through car detention which is analogous to the burden which they would bear on traffic interchanged with Seatrain if the latter should pay per diem only when the cars are in its actual possession,

and that it was also clear that this car detention in the case of traffic interchanged with water lines, due to infrequent service, is a disability which has always been recognized and which is reflected in the demurrage rules and also, presumably, in the rail rates and divisions applicable to such traffic. The Commission continued:

> From this point of view, such detention is a matter for consideration in connection with these rates and divisions, rather than in determining the pier diem rates which Seatrain should pay.

10. In this connection the Commission concluded that the result will be about the same in either event because if the rail defendants are relieved by per diem payments of Seatrain from a burden of car detention which they bear on traffic

interchanged with the break bulk lines, theoretically they will be entitled to relatively lower divisions of through rail-water rates with Seatrain than with the break-bulk lines, or to relatively lower local or proportional rates to or from the ports where the through rates are made on combination. It found that considerable difficulty would be encountered in making any such adjustment, and that the simple and desirable way of handling the matter is to leave the burden of car detention with the rail carriers when traffic is interchanged with Seatrain, just as when it is interchanged with the break-bulk lines. The Commission further found that under this method, Seatrain would pay per diem only when the cars are in its actual possession or are being held for its use awaiting loading at the ports. Accordingly, reinforcing this view by a statement that the Seatrain's line-haul connections at Hoboken have agreed to this method, the Commission stated it would make no findings having the effect of forcing Seatrain to assume the payment of reclaim to complainants' on cars being held at the ports for delivery to its vessels.

ADDITIONAL CONCLUSIONS OF LAW

1. The findings of the Commission in respect to the compensation to be paid by Seatrain to the petitioners for the use of the petitioner's cars find adequate support in the evidence, as do the Commission's conclusions in the law.

2. The rate of compensation ordered by the Commission to be paid by Seatrain to the petitioners for the use of petitioner's freight cars interchanged with Seatrain, including the current rate of $1 per day payable by Seatrain for such period as the cars are in its actual possession, is not confiscatory but is reasonable.

JOHN BIGGS, JR.,
*United States Circuit Judge.*

GUY L. FAKE,
*United States District Judge.*

WILLIAM F. SMITH,
*United States District Judge.*

DECEMBER 8, 1943.

# In the District Court of the United States for the District of New Jersey

CIVIL NO. 2092

THE PENNSYLVANIA RAILROAD COMPANY, ATLANTIC COAST LINE RAILROAD COMPANY, THE BOSTON AND MAINE RAILROAD, MERREL P. CALLAWAY, TRUSTEE OF CENTRAL OF GEORGIA RAILWAY COMPANY, GREAT NORTHERN RAILWAY COMPANY, THE LONG ISLAND RAIL ROAD COMPANY, LOUISVILLE AND NASHVILLE RAILROAD COMPANY, MAINE CENTRAL RAILROAD COMPANY, NORFOLK AND WESTERN RAILWAY COMPANY, NORTHERN PACIFIC RAILWAY COMPANY, LEIGH R. POWELL, JR., AND HENRY W. ANDERSON, RECEIVERS OF SEABOARD AIR LINE RAILWAY COMPANY, SOUTHERN RAILWAY COMPANY, SOUTHERN PACIFIC COMPANY, TEXAS AND NEW ORLEANS RAILROAD COMPANY, UNION PACIFIC RAILROAD COMPANY, PETITIONERS

*against*

UNITED STATES OF AMERICA, DEFENDANT

AND

THE INTERSTATE COMMERCE COMMISSION, HOBOKEN MANUFACTURERS RAILROAD COMPANY, SEATRAIN LINES, INC., NEW ORLEANS AND LOWER COAST RAILROAD COMPANY, INTERVENERS-DEFENDANTS

## FINAL DECREE

This cause coming on to be heard before a specially constituted Court of three judges, duly assembled pursuant to the Urgent Deficiencies Act, 28 U. S. C., Secs. 41, 43–48, and having been submitted for final decree, and the pleadings, evidence, and arguments having been heard and considered, and the Court having been fully advised in the premises, and having filed its opinion, findings of fact, and conclusions of law, it is

ORDERED, ADJUDGED, AND DECREED that the order of the Interstate Commerce Commission, dated October 13, 1941, in the proceedings entitled Docket No. 25728, *Hoboken Manufacturers Railroad Company* v. *Abilene & Southern Railway Company, et al.*, and Docket No. 25878, *New Orleans and Lower Coast Railroad Company* v. *Akron, Canton & Youngstown Railway Company, et al.*, as from time to time amended, insofar as said order directs petitioners to permit the interchange of their freight cars with or for the use of Seatrain Lines, Inc., for transportation beyond the United States and its territorial waters, in extraterritorial waters, or to a foreign port, is erroneous and beyond the lawful authority of the Interstate Commerce Commission and is void, and to the extent indi-

cated said order is hereby set aside, annulled and the enforcement thereof enjoined.

JOHN BIGGS, JR.,
*United States Circuit Judge.*

GUY L. FAKE,
*United States District Judge.*

WILLIAM F. SMITH,
*United States District Judge.*

Dated: December 8, 1943.

U. S. GOVERNMENT PRINTING OFFICE: 1944